This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at http://books.google.com/

REPORTS

OF

CASES

DECIDED IN THE

HIGH COURT OF CHANCERY,

BY

THE RIGHT HON. SIR LANCELOT SHADWELL,

VICE-CHANCELLOR OF ENGLAND.

BY NICHOLAS SIMONS,

Of Lincoln's Inn, Esq., Barrister at Law.

VOL. XVI.

CONTAINING CASES IN 1847, 1848, AND 1849.

LONDON:

V. & R. STEVENS AND G. S. NORTON,

Law Booksellers and Publishers;

(*Successors to the late J. & W. T. CLARKE, of Portugal Street,*)

26, BELL YARD, LINCOLN'S INN;

AND HODGES & SMITH, DUBLIN.

MDCCCL.

LIBRARY OF THE
LELAND STANFORD, JR., UNIVERSITY
LAW DEPARTMENT.

a. 56334

JUL 15 1901

LONDON:
STEVENS AND CO., PRINTERS, BELL YARD,
LINCOLN'S INN.

Lord Cottenham . . .	Lord Chancellor.
Lord Langdale	Master of the Rolls.
Sir Lancelot Shadwell . .	Vice-Chancellor of England.
Sir James Lewis Knight Bruce Sir James Wigram . . .	Vice-Chancellors.
Sir John Jervis . . .	Attorney-General.
Sir David Dundas . . . Sir John Romilly . .	Solicitors-General

A

TABLE

OF THE

CASES REPORTED

IN THIS VOLUME.

A.

Page

AMHERST (Lord), Duke of Leeds *v.* . . . 431
Antrobus, Cuningham *v.* 436
——— *v.* Hodgson . 450
Arnold *v.* Arnold . . 404
Ashburnham *v.* Ashburnham 186
Attorney-General *v.* Wilson 210
——— *v.* Wiltshere . 36
——— *v.* Norwich (Corporation of) 225
——— *v.* Stamford (Earl of) 453
——— *v.* Marsh . . 572

B.

Backhouse, Maitland *v.* . 58
Banks *v.* Parker . . 176
Barnard, Carter *v.* . . 157
Bartholomew's Trust, *In re* 585
Benn *v.* Dixon . . . 21
Berkeley *v.* Swinburne . 275
Best, Mason *v.* . . . 429
Biddles *v.* Biddles . . 1
Bishop *v.* Colebrook . . 39
Blagrove *v.* Hancock . 371
Board, Jowett *v.*. . . 352
Boddington, Webster *v.* . 177
Borton *v.* Borton . . 552
Boyce *v.* Boyce . . 476
Briant, Jenkins *v.* . . 272
Bridges *v.* Hinxman . 71
Bult, Gough *v.* . . 45 & 323
Burley *v.* Evelyn . . 290
Butcher, Willcocks *v.* . . 366

C.

Camden (Marquis of), Walker *v.* 329
Carter *v.* Barnard . . 157
——— *v.* Taggart 423 & 447

Page

Charlemont, Jones *v.* . 271
Chipchase *v.* Simpson . . 485
Christ's Hospital *v.* Grainger 83
Churchward, Hodge *v.* . 71
Clark *v.* Webb . . . 161
Clayton, Wroe *v.* . . 183
Cole *v.* Scott . . . 259
Colebrook, Bishop *v.* . 39
Congreve, Parrott *v.* . . 579
Cowper *v.* Taylor . . 314
Crockett, Thorneycroft *v.* . 445
Cunningham, Macgregor *v.* 365
——— *v.* Antrobus . . 436

D.

Davies, Fowler *v.* . . 182
Dawson *v.* Pilling . . 203
Dixon, Benn *v.* . . 21
Dobinson *v.* Hawks . . 407
Drever *v.* Mawdesley . 511
Dykes *v.* Taylor . . . 563

E.

East India Company, Smith *v.* 76
East India Docks and Birmingham Junction Railway Act, *In re* . . . 174
Evelyn, Burley *v.* . . 290

F.

Fane, *Ex parte* . . . 406
Farn, Warburton *v.*. . . 625
Faulkner, Lowe *v.* . . 250
Fergusson, Harris *v.* . 308
Finden *v.* Stephens . . 40
Flint *v.* Warren . . 124
Forbes, Stewart *v.* . . 343
Forshaw, *In re* . . 121
Fortescue, Neville *v.* . . 333
Foster *v.* Foster . . 637
Fowler *v.* Davies . . 182

G.

Gibson, Hunter *v.* . . 158
Glover *v.* Hall . . . 568
Goodale *v.* Goodale . . 316
Goring *v.* Howard . . 395
Gough *v.* Bult . . 45 & 323
Grainger, Christ's Hospital *v.* 83
Great Northern Railway Company, Poynder *v.* . . 3
———, *Ex parte* . . 169
———, Langham *v.* . . 173
Griffin, Hereford (Bishop of) *v.* 190
Griffith *v.* Griffith . . 35
Guy, Stiles *v.* . . . 230

H.

Haddan *v.* Smith . . 42
Hague, Peel *v.* . . 315
Halford *v.* Stains . . 488

	Page
Hall, Jones *v.*	500
——, Glover *v.*	568
Hamerton, Hawkins *v.*	410
Hancock, Blagrove *v.*	371
Harris *v.* Fergusson	308
Hawkins *v.* Hamerton	410
Hawks, Dobinson *v.*	407
Hereford (Bishop of) *v.* Griffin	190
Hinxman, Bridges *v.*	71
Hirst *v.* Tolson	620
Hodge *v.* Churchward	71
Hodgson, Antrobus *v.*	450
Hornby *v.* Matcham	325
Howard, Goring *v.*	395
Hunter *v.* Gibson	158
J.	
Jenkins *v.* Briant	272
Jobson, Symers *v.*	267
Johnson, Tucker *v.*	341
Jones *v.* Charlemont	271
—— *v.* Hall	500
——, Noel *v.*	309
Jowett *v.* Board	352
K.	
Knight, Thornton *v.*	509
L.	
Langham *v.* Great Northern Railway Company	173
Law *v.* Urlwin	377
Leeds (Duke of) *v.* Lord Amherst	431
Lewes *v.* Lewes	266
Lewis, Thomas *v.*	73
London and Southampton Railway Extension Act, *In re*	165
Lowe *v.* Faulkner	250
M.	
Macgregor *v.* Cunningham	365
M'Mahon *v.* Rawlings	429
Maddan, Yates *v.*	613
Madocks, Roberts *v.*	55
Maitland *v.* Backhouse	58
Marsh, Attorney-General *v.*	572
Mason *v.* Best	429
Matcham, Hornby *v.*	325
May *v.* Skey	588
Mawdesley, Drever *v.*	511
Melville, Preston *v.*	163
Mitford *v.* Reynolds	105 & 130
Morgan *v.* Rutson	234
——, Worthington *v.*	547
Morris, Rubery *v.*	433
Morrison, *In re*	412
Mount, Rashleigh *v.*	390
Myers v. Perigal	533
N.	
Neville *v.* Fortescue	333

GENERAL BOOKBINDING CO.
80 53
1235T 004 7 s D.R. 2245
QUALITY CONTROL MARK

	Page
Newport Marsh Trustees, *Ex parte*	346
Nicholls, Turner *v.*	565
Noel *v.* Jones	309
Northern Railway Company, Poynder *v.*	3
———, Langham *v.*	173
Norwich (Corporation of), Attorney-General *v.*	225
O.	
Onslow *v.* Wallis	483
P.	
Parker, Banks *v.*	176
———, Price *v.*	198
Parrott *v.* Congreve	579
Peel *v.* Hague	315
Perigal, Myers *v.*	533
Peto *v.* Peto	590
Pilling, Dawson *v.*	203
Pincombe, Smith *v.*	497
Porter *v.* Smith	251
Poynder *v.* Great Northern Railway Company	3
Preston *v.* Melville	163
Price *v.* Parker	198
R.	
Rackham *v.* Siddall	297
Raincock *v.* Young	122 & 566
Ramsay *v.* Thorngate	575
Rashleigh *v.* Mount	390
Rawlings, M'Mahon *v.*	429
Reynolds, Mitford *v.*	105 & 130
Roberts *v.* Madocks	55
——— *v.* Roberts	367
Rodney *v.* Rodney	307
Rosslyn's Trust, *In re*	391
Rubery *v.* Morris	433
Rutson, Morgan *v.*	234
S.	
Scarf *v.* Soulby	481
Scott, Cole *v.*	259
Sheffield and Lincolnshire Railway Act, *In re*	159
Shelton *v.* Watson	543
Siddall, Rackham *v.*	297
Simpson, Chipchase *v.*	485
Skey, May *v.*	588
Smith *v.* East India Company	76
——, Haddan *v.*	42
—— *v.* Pincombe	497
——, Porter *v.*	251
Soulby, Scarf *v.*	481
Stains, Halford *v.*	488
Stamford (Earl of), The Attorney-General *v.*	453
Stephens, Finden *v.*	40
Stewart *v.* Forbes	343
Stiles *v.* Guy	230

Page

Stillman *v.* Weedon . . 26
Swinburne, Berkeley *v.* . 275
Symers *v.* Jobson . . 267
Symes, Watts *v.* . 640 & 647

T.

Taggart, Carter *v.* 423 & 447
Taylor, Cowper *v.* . . 314
———, Dykes *v.* . . 563
Third Burnt Tree Building Society, *In re* . . 296
Thomas *v.* Lewis . . 73
Thorneycroft *v.* Crockett . 445
Thorngate, Ramsay *v.* . 575
Thornton *v.* Knight . . 509
Tolson Hirst, *v.* . . 620
Trevannion, Walsh *v.* . 178
Tucker *v.* Johnson . . 341
Turner *v.* Nicholls . . 565

U.

Urlwin, Law *v.* . . . 377

W.

Walker *v.* Marquis of Camden 329

Page

Wallis, Onslow *v.* . . 483
Walsh *v.* Trevannion . . 178
Warburton *v.* Farn . 625
Warren, Flint *v.* . . 124
Watson, Shelton *v.* . 543
Watts *v.* Symes . 640 & 647
Webb *v.* Webb . . 55
——, Clark *v.* . . . 161
Webster *v.* Boddington . 177
Weedon, Stillman *v.* . . 26
Wellesley *v.* Wellesley . 1
Wheable *v.* Withers . . 505
Willcocks *v.* Butcher . 366
Wilson, Attorney-General *v.* 210
Wiltshere, ———— *v.* 36
Withers, Wheable *v.* . . 505
Withington *v.* Withington 104
Worthington *v.* Morgan . 547
Wroe *v.* Clayton . . 183

Y.

Yates *v.* Maddan . . 613
Young, Raincock *v.* 122 & 566

CASES IN CHANCERY,

BEFORE THE

VICE-CHANCELLOR.

Hilton v Hill 2 D. M. & G. 808. S. C. 1 Del. Macn & Gor. 501.
Page v Page 16 Beav. 588. In re Hakewill 3 id. 116.

WELLESLEY *v.* WELLESLEY.

1847: 23rd July.

Pauper Peeress.

A peeress allowed to sue as a pauper.

MR. *ROLT* moved that a lady, the wife of a peer, but from whom she was living separate, might be at liberty to sue *in formâ pauperis*, on an affidavit of her poverty, and that she was unable to procure any one to act as her next friend.

The *Vice-Chancellor* made the order.

BIDDLES *v.* BIDDLES.

1847: 24th July.

Legacy and Legatee. Trust. Construction. Will.

Testatrix gave 1000*l.* to her nephew to maintain and bring up her natural son, F. B.; and she directed the interest of one fourth of her residue to be applied for the maintenance and education of F. B. during his infancy, and the capital to be paid to him on his attaining twenty-one.

Held that the nephew was not a trustee of the 1000*l.* for F. B., but was entitled to it for his own benefit.

THE testatrix in the cause bequeathed 1000*l.* to her nephew, *Thomas Biddles, to maintain and bring up her natural and dear son Frederick Biddles;* and she directed a competent part of the income of one fourth

1847.

BIDDLES v. BIDDLES.

of her residuary personal estate to be applied for the maintenance and education of *Frederick Biddles* during his infancy, and the capital to be paid to him on his attaining twenty-one.

On the hearing of a petition, the question was whether *Thomas Biddles* was entitled to the 1000*l.* for his own use and benefit, or was a trustee of that sum for *Frederick Biddles*.

Mr. *Rolt* and Mr. *Boyle*, for *Thomas Biddles*, cited *Thorp* v. *Owen* (*a*).

Mr. *Webb* for *Frederick Biddles*.

Mr. *Walker* and Mr. *F. J. Hall* for other parties.

The *Vice-Chancellor* said that it was impossible to make out that the 1000*l.* was given in trust for *Frederick Biddles*, especially as the testatrix had given him one fourth of her residue, and made a provision, for his maintenance, out of the interest of it.

Declare that *Thomas Biddles* is entitled, for his own benefit, to the legacy of 1000*l.* given to him, to maintain and bring up *Frederick Biddles*.

(*a*) 2 Hare, 607.

POYNDER *v.* THE GREAT NORTHERN RAILWAY COMPANY.

1847: 23rd, 24th, and 26th July.

Lands Clauses Consolidation Act. Construction.

THE questions in this case arose upon the 18th, 58th, 59th, 85th, and 86th sections of the Lands Clauses Consolidation Act, 8th and 9th Vict. c. 18, and the 32nd, 33rd, and 35th sections of the Railways Clauses Consolidation Act, 8th and 9th Vict. c. 20, both of which Acts were incorporated with the Act for making the Great Northern Railway.

The instrument by which a surveyor is appointed under the 85th sect. of the Lands Clauses Consolidation Act, need not specify either the lands which the surveyor is to value, or the course of the railway.

The sureties in a bond to be given to the land-owner, under that section, may be appointed without notice to the land-owner; but the money secured by it ought not to be made payable on demand. The condition of the bond ought to adopt the words of the section, and make the money payable either to the obligee or into the Bank of *England*, "as the case may require."

The 18th sect. of the Lands Clauses Consolidation Act, enacts that, when the promoters of an undertaking shall require to purchase or take any of the lands which by this Act, or the special Act, or any Act incorporated therewith, they are authorized to purchase or take, they shall give notice thereof to all the parties interested in such lands, or to the parties enabled by this Act to sell and convey or release the same, or such of the said parties as shall, after diligent inquiry, be known to the promoters

Money paid into the Bank under the 86th section, to the credit of *Ex parte* the promoters of the undertaking, the account of the land-owner, held to be rightly paid in.

Construction.—Railways Clauses Consolidation Act.—Railway.

A notice given by a railway company, under the 32nd sect. of the Railways Clauses Consolidation Act, of their intention to take temporary possession of land, ought to state for which of the purposes mentioned in that section the land is meant to be used. A notice that the company intend to enter upon the land for those purposes, *or some or one of them*, is not sufficient.

1847.

POYNDER v. THE GREAT NORTHERN RAILWAY COMPANY.

of the undertaking; and, by such notice, shall demand from such parties the particulars of their estate and interest in such lands, and of the claims made by them in respect thereof; and every such notice shall state the particulars of the lands so required, and that the promoters of the undertaking are willing to treat for the purchase thereof and as to the compensation to be made to all parties for the damage that may be sustained by them by reason of the execution of the works.

The 58th sect. enacts that the purchase-money or compensation to be paid for any lands to be taken by the promoters of the undertaking from any party who, by reason of absence from the kingdom, is prevented from treating, or who cannot after diligent inquiry be found, or who shall not appear at the time appointed for the inquiry before the jury as hereinbefore provided for, after due notice thereof, and the compensation to be paid for any permanent injury to such lands, shall be such as shall be determined by the valuation of such able practical surveyor as two justices shall nominate for that purpose as hereinafter mentioned.

The 59th sect. enacts that, upon the application, by the promoters of the undertaking, to two justices, and upon such proof as shall be satisfactory to them that such party is, by reason of absence from the kingdom, prevented from treating, or cannot, after diligent inquiry, be found, or that any such party failed to appear on any such inquiry before a jury as aforesaid, after due notice to him for that purpose, such justices shall, by writing under their hands, nominate an able practical surveyor for determining such compensation as aforesaid, and such surveyor shall determine the same accordingly,

1847.

POYNDER v. THE GREAT NORTHERN RAILWAY COMPANY.

and shall annex to his valuation a declaration in writing, subscribed by him, of the correctness thereof.

The 85th sect. enacts that if the promoters of the undertaking shall be desirous of entering upon and using any such lands, before an agreement shall have been come to, or an award made, or verdict given, for the purchase-money or compensation to be paid by them in respect of such lands, it shall be lawful for the promoters of the undertaking to deposit in the Bank, by way of security as hereinafter mentioned, either the amount of purchase-money or compensation claimed by any party interested in or entitled to sell and convey such lands and who shall not consent to such entry, or such a sum as shall, by a surveyor appointed by two Justices in the manner hereinbefore provided in the case of parties who cannot be found, be determined to be the value of such lands or of the interest therein which such party is entitled to or enabled to sell and convey, and also to give to such party a bond under the common seal of the promoters if they be a corporation, or, if they be not a corporation, under the hands and seals of the promoters or any two of them, with two sufficient sureties to be approved of by two Justices *in case the parties differ*, in a penal sum equal to the sum so to be deposited, *conditioned for payment, to such party, or for deposit in the Bank for the benefit of the parties interested in such lands, as the case may require*, under the provisions herein contained, of all such purchase-money or compensation as may, in manner hereinbefore provided, be determined to be payable by the promoters of the undertaking in respect of the lands so entered upon, together with interest thereon, at the rate of 5*l. per centum per annum*, from the time of entering on such land, until such purchase-money or compensation shall be paid to such party or deposited in the Bank for the

1847.

POYNDER v. THE GREAT NORTHERN RAILWAY COMPANY.

benefit of the parties interested in such lands, under the provisions herein contained; and, upon such deposit by way of security being made as aforesaid, and such bond being delivered or tendered to such non-consenting party as aforesaid, it shall be lawful for the promoters of the undertaking to enter upon and use such lands, without having first paid or deposited the purchase-money or compensation in other cases required to be paid or deposited by them before entering upon any lands to be taken by them under the provisions of this or the special Act.

The 86th sect. enacts that the money so to be deposited as last aforesaid, shall be paid into the Bank in the name and with the privity of the *Accountant-General* of the Court of Chancery in *England*, or the Court of Exchequer in *Ireland*, to be placed to his account there, *to the credit of the parties interested in or entitled to sell and convey the lands so to be entered upon*, and who shall not have consented to such entry, subject to the control and disposition of the said Court; and, upon such deposit being made, the cashier of the Bank shall give, to the promoters of the undertaking, or to the party paying in such money by their direction, a receipt for such money, specifying therein for what purpose and to whose credit the same shall have been paid in.

The 32nd sect. of the Railways Clauses Consolidation Act enacts that, subject to the provisions herein and in the special Act contained, it shall be lawful, for the company, at any time before the expiration of the period by the special Act limited for the completion of the railway, without making any previous payment, tender, or deposit, to enter upon any lands within the prescribed limits, or, if no limits be prescribed, not being more than 200 yards distant from the centre of the rail-

way as delineated on the plans, and not being a garden, orchard, &c., &c.; and to occupy the said lands so long as may be necessary for the construction or repair of that portion of the railway or of the accommodation-works connected therewith thereinafter-mentioned, and to use the same for any of the following purposes, that is to say: for the purpose of taking earth or soil, by side-cuttings, therefrom; for the purpose of depositing spoil thereon; for the purpose of obtaining materials therefrom for the construction or repair of the railway, or such accommodation-works as aforesaid; or, for the purpose of forming roads thereon to or from or by the side of the railway, &c., &c.

The 33rd sect. enacts that, in case any such lands shall be required for spoil-banks or for side-cuttings, or for obtaining materials for the construction or repair of the railway, the company shall, before entering thereon, except in the case of accident to the railway requiring immediate reparation, give three weeks' notice, in writing, to the owners and occupiers of such lands, of their intention to enter upon the same for such purposes; and, in case the said lands are required for any of the other purposes hereinbefore mentioned, the company shall, except in the case aforesaid, give ten days' like notice thereof; and the company shall, in such notices respectively state the substance of the provisions hereinafter contained respecting the right of such owner or occupier to require the company to purchase any such lands, or to receive compensation for the temporary occupation thereof, as the case may be.

The 35th sect. enacts that, in any case in which a notice of three weeks is thereinbefore required to be given, it shall be lawful for the owner or occupier of the lands therein referred to, within ten days after the ser-

1847.

POYNDER v. THE GREAT NORTHERN RAILWAY COMPANY.

vice of such notice, by notice in writing to the company, to object to the company making use of such lands, either on the ground that the lands proposed to be taken for the purposes aforesaid, or some part thereof or of the materials contained therein, are essential to be retained, by such owner, in order to the beneficial enjoyment of other neighbouring lands belonging to him, or on the ground that other lands lying contiguous or near to those proposed to be taken, would be more fitting to be used for such purposes by the company; and, upon objection being so made, such proceedings may be had as hereinafter mentioned.

In Feb. 1847, the Defendants, who were a body corporate and empowered by their Act of Parliament to make their railway through lands in the parish of *Islington*, of which the Plaintiff claimed to be seised in fee, served the Plaintiff with notice to treat with them for the sale of certain parts of those lands, containing, altogether, three roods and two perches, and which were delineated in the plan annexed to the notice, and formed part of certain closes numbered 499, 557, and 503, in the plan and book of reference deposited in pursuance of the Act. The Plaintiff claimed 1338*l.* for the pieces of land comprised in the notice; and as the railway, when made, would sever the part of number 557, which was not comprised in the notice, from his other lands, and would thereby render it useless to him; he required the Defendants either to purchase that part, or to pay him 500*l.* for the damage which the severance would occasion.—No agreement, however, was come to between the parties; nor were two arbitrators appointed by them, able to agree as to the sum which the Plaintiff was entitled to; and an umpire appointed by the arbitrators refused to act. Under these circumstances, the Defendants procured a surveyor to be appointed by two Justices

1847.

POYNDER v. THE GREAT NORTHERN RAILWAY COMPANY.

for *Middlesex*. The instrument signed by the Justices recited that the Defendants were desirous of entering upon and using the pieces of land described in the schedule thereto, which were situate in the parish of *Islington*, and were required to be purchased and permanently used for the purposes of the railway, and which belonged to, or were reputed to belong to, the Plaintiff, and were in the occupation of *John Nicholls*; and that no agreement had been come to or award made for the purchase-money or compensation to be paid by the Defendants in respect thereof or of the Plaintiff's interest therein; and that the Defendants were desirous of depositing in the Bank, by way of security, according to the provisions of the Lands Clauses Consolidation Act, such sum as should, by a surveyor to be appointed by the Justices, be determined to be the value of the said pieces of land, or of the Plaintiff's interest therein. It then appointed *George Smith*, an able and practical surveyor, to determine the value of the pieces of land, or of the Plaintiff's interest therein; and it expressed that the Justices approved of *Robert Baxter* and *Philip Rose* as sureties to join the Defendants in a bond conditioned for the payment to the Plaintiff, or for deposit in the Bank for his benefit, under the provisions of the last-mentioned Act, of such purchase-money or compensation as might be determined to be payable by the Defendants in respect of the lands to be entered upon. The schedule referred to by that instrument was in the following words:—"All those pieces of land and hereditaments containing by admeasurement three roods and two perches, be the same more or less, situate in the Parish of *Saint Mary, Islington*, in the County of *Middlesex*, and now or late in the occupation of *John Nicholls:* all which hereditaments and premises above described are part of certain lands, tenements, and hereditaments

1847.

POYNDER v. THE GREAT NORTHERN RAILWAY COMPANY.

delineated in the parliamentary plan and book of reference thereto, deposited, by the *Great Northern Railway Company*, with the Clerk of the Peace for the County of *Middlesex*, and in such plan and book of reference distinguished by the numbers 499, 557, and 503."

Mr. *Smith*, the surveyor, reported that he had valued the Plaintiff's estate and interest in the lands and hereditaments mentioned in the schedule, at 950*l.*; and, by a paper annexed to his valuation, he declared that, having had regard not only to the value of the lands required to be purchased and permanently used by the Defendants for the purposes of the railway, and which belonged to, or were reputed to belong to, the Plaintiff, and were in the occupation of *Nicholls*, but also to the damage which would be sustained by reason of the severing of the lands taken, from *Nicholls's* other lands, the sum of 950*l.* was the proper compensation to be paid to the Plaintiff for his estate and interest in the said lands. The Defendants paid the 950*l.* to one of the cashiers of the Bank of *England*, and it was placed to the account of the *Accountant-General* to the credit of *Ex parte the Great Northern Railway Company*, the account of the Plaintiff. Shortly afterwards, the Defendants delivered to the Plaintiff their bond, (in which *Robert Baxter* and *Philip Rose*, who were two of the solicitors to the company, joined as sureties,) conditioned to be void if the obligors, or any of them should, *on demand*, pay or cause to be paid, to the Plaintiff, his heirs, executors, administrators, or assigns, or should, *on demand*, deposit in the Bank of *England*, under the provisions of the Lands Clauses Consolidation Act, the amount of all such purchase-money or compensation as should, in the manner provided by that Act, be determined to be payable by the Defendants, in respect of the lands containing three

roods and two perches, together with interest thereon after the rate of *5l. per centum per annum* from the time of entering upon such lands until such purchase or compensation-money should be paid or deposited as thereinbefore mentioned. On the back of the bond, there was a receipt signed by the cashier to whom the 950*l.* had been paid, stating that that sum had been placed to the account of the *Accountant-General* to the credit of *Ex parte the Great Northern Railway Company*, the account of the Plaintiff, in the books kept at the Bank for the suitors of the Court of Chancery.

The bill alleged that the Defendants, in procuring the appointment of a surveyor, obtaining the valuation, depositing the 950*l.* in the Bank of *England*, and executing and delivering to Plaintiff the bond, had assumed and purported to act in pursuance of the provisions of the 85th section of the Lands Clauses Consolidation Act and the sections referred to in that section, for the purpose of enabling the Defendants to enter upon and use the Plaintiff's lands before the amount of the purchase and compensation-money had been either paid or ascertained; but, in truth, the provisions of no part of the last-mentioned Act had been properly pursued:

That, amongst other non-compliances with that Act, the appointment of the surveyor was informal and invalid; inasmuch as the schedule annexed to such appointment did not particularly specify, either by means of a plan or otherwise, what particular parts of the pieces of land numbered 499, 557, and 503 were to be valued, or in what manner the line of the railway would cross such lands, or how the same would be severed thereby; and the only description, given by the appointment, of

1847.

POYNDER v. THE GREAT NORTHERN RAILWAY COMPANY.

the lands to be valued, was the description given in the schedule to the appointment, which schedule merely directed the surveyor to value three roods and two perches of the pieces of land numbered 499, 557, and 503: and that the valuation of the surveyor which was annexed to the appointment was also informal and invalid; inasmuch as the lands valued were not specified more particularly than by a reference to the schedule annexed to the appointment:

That the appointment of *Baxter* and *Rose* to be such sureties as aforesaid, was made, by the Justices, without any application to the Plaintiff to approve of them or any other persons as such sureties; and therefore the Justices had no power to appoint them, or either of them, to be such sureties; inasmuch as the power of appointing sureties for the purpose of such a bond as thereinbefore-mentioned, was, by the Lands Clauses Consolidation Act, given to Justices, only in case the parties differed about such sureties; which was not the case with reference to the matters aforesaid; for the Plaintiff never had any opportunity of differing from or consenting to the appointment of any persons as sureties:

That neither the bond nor the condition written under it, was in compliance with the terms of the 85th section of the Lands Clauses Consolidation Act; and, in particular, the terms of the condition were insufficient and unauthorized, inasmuch as they made it incumbent on the Plaintiff to make a strict, technical, legal demand of the payment of the money secured thereby, before the bond could be put in force; whereas the Plaintiff ought to have been entitled to enforce the bond without the necessity of any previous demand: and that the terms of the condition were further insufficient and unauthorized,

1847.

POYNDER v. THE GREAT NORTHERN RAILWAY COMPANY.

inasmuch as they made it incumbent on the Plaintiff to make such demand upon the company and the two sureties jointly; and inasmuch as they made the bond void upon payment of the money therein referred to, either into the Bank of *England* or to the Plaintiff, at the option of the obligors; whereas, inasmuch as the Plaintiff was the owner in fee simple in possession of the lands, subject only to *Nicholls's* lease, whatever money might become payable to the Plaintiff from the company, in respect of the lands and of the damage done to the same, would be payable to the Plaintiff himself, and not into the Bank of *England*, and could not be lawfully paid into the Bank:

That the 950*l.* was less, by 400*l.* and upwards, than the value of the Plaintiff's interest in the pieces of land containing three roods and two perches, independently of the amount of damage done, to his inheritance, by severance of the lands comprised in the lease, and which damage was to the extent of 500*l.*; and that the amount so as aforesaid claimed by the Plaintiff, for the purchase of his interest in the said lands, and for compensation for such damage by severance, was still claimed by him, and was not more than ought to be paid:

That, on the 12th of July 1847, the Defendants took forcible possession of the last-mentioned pieces of land, and were about to excavate the same.

The bill further alleged that, on the 12th of July 1847, the Defendants gave the Plaintiff notice that, in pursuance of their Act and of the Railways Clauses Consolidation Act, they intended, at the expiration of three weeks from the service of such notice, by their agents and workmen to enter upon the lands described

1847.

POYNDER v. THE GREAT NORTHERN RAILWAY COMPANY.

or referred to in the plan thereunto annexed and therein coloured yellow, such lands being not more than 200 yards distant from the centre of the railway, and being required by them for the several purposes thereinafter mentioned, *some or one of them*, that was to say, for the purpose of taking earth or soil, &c. &c.* That a plan was annexed to such notice, upon which were delineated certain lands coloured yellow, which were part of the hereditaments of which the Plaintiff was tenant in fee simple in possession, and which were comprised in *Nicholls's* lease: That the Defendants threatened and intended, immediately on the expiration of the three weeks, to enter upon the last-mentioned lands, upon the allegation that the notice was a due compliance with the directions in that behalf contained in the Railways Clauses Consolidation Act: but the fact was that the Defendants would not, at the expiration of the three weeks, have any right or title to enter upon those lands, inasmuch as the notice did not specify which of the purposes therein-mentioned was or were the purpose or purposes for which the Defendants intended to enter upon the lands.

The bill prayed that the Defendants might be restrained, as well *ad interim* as perpetually, from making their railway over the lands containing three roods and two perches, and from excavating, digging, or otherwise using the same, and from continuing any longer in possession thereof: and also from entering upon the lands referred to by the last-mentioned notice, or any part thereof, and from using such lands for any of the purposes mentioned in such notice.

* The notice mentioned all the purposes for which temporary possession may be taken of lands, under the 32nd sect. of the Railways Clauses Act.

Mr. *Bethell* and Mr. *Craig* moved for the injunction.

They contended, first, that the surveyor appointed by the Justices, was unable to form a correct estimate as to the purchase-money and compensation for injury which the Plaintiff was entitled to, because the appointment mentioned only the quantity, and did not either specify the precise parts of the Plaintiff's lands which were to be valued, or point out the course which the railway was intended to take.

Secondly, that the sureties in the bond had been improperly appointed: for the 85th section of the Lands Clauses Consolidation Act required the sureties to be sufficient, and did not authorize the Justices to appoint them unless the parties differed; and, therefore, it was plain that the appointment ought not to have been a mere *ex parte* proceeding, but the Plaintiff ought to have had notice of it.

Thirdly, that the condition of the bond was not in the form prescribed by the 85th section; for, first, it rendered a demand necessary before the bond could be enforced; and, secondly, it made the bond void in case the obligors should pay the money intended to be secured by it, either into the Bank or to the Plaintiff: whereas it ought to have made the bond void, in the event only of the obligor's paying the money to the Plaintiff; for he was seised in fee of the lands in respect of which the money was to be paid.

Fourthly, that the 950*l.* ought to have been paid into the Bank, not to the credit of *Ex parte* the Railway Company, the account of the Plaintiff, but to the account of the Plaintiff alone; for then the Plaintiff might have

1847.

POYNDER v. THE GREAT NORTHERN RAILWAY COMPANY.

applied for payment of it without giving notice to the company, which he could not now do.*

Lastly, that the notice of the 12th of July 1847, (to take the lands coloured yellow,) instead of stating that the Defendants required those lands for the several purposes thereinafter-mentioned, *some or one of them* ought to have stated which of those purposes the lands were required for; for then the Plaintiff might have shown that other contiguous lands were more fitting to be used for such purposes.

Mr. *Rolt* and Mr. *Denison*, for the Defendants, said, first, that the Lands Clauses Act did not require the lands which the surveyor was to value to be specified in the appointment, or the course of the railway over them to be delineated in it, and that, if it had done so, the omission of those particulars in the appointment in question, afforded no good ground for complaint, because the surveyor had valued the land which he was intended to value; secondly, that it was by no means clear that the 85th sect. of the Act required a corporation (which the Defendants were) to give a bond with sureties; but, if it did, the bill did not call in question the sufficiency of *Baxter* and *Rose*, and, therefore, the Plaintiff had no right to object to their having been appointed without notice to him: besides which, the *Lord Chancellor* had decided in *Bridges* v. *The Wilts, Somerset, and Weymouth Railway Company* (*a*), that the appointment of sureties might be made *ex parte*, and also that a party applying for an injunction, must show some injury; thirdly, that

* The money seems to have been paid into the right account. See the 69th sect. of the Lands Clauses Act.

(*a*) 4 *Railway Cases*, 622.

the money secured by the bond was rightly made payable, either to the Plaintiff or into the Bank; for, until the defendants had investigated the Plaintiff's title to the land, they could not tell what *the case would require;* whether it would require that the money should be paid to the Plaintiff or into the Bank: that the circumstance of its being made payable on demand, did not render a previous demand necessary, for the bringing of an action for it was, of itself, a demand, *Norton* v. *Ellam* (*b*): and that the 950*l.* had been paid in to the right account, for the *Accountant-General* would not receive money except in some cause or in some matter; and the 76th sect. of the Act * showed that it had been rightly paid in: lastly, that the notice of July, 1847, respecting the lands coloured

* That section enacts that, if the owner of any such lands purchased or taken by the promoters of the undertaking, or of any interest therein, on tender of the purchase-money or compensation either agreed or awarded to be paid in respect thereof, refuse to accept the same, or neglect or fail to make out a title to such lands or to the interest therein claimed by him, to the satisfaction of the promoters of the undertaking; or if he refuse to convey or release such lands as directed by the promoters of the undertaking, or if any such owner be absent from the kingdom, or cannot after diligent inquiry be found, or fail to appear on the inquiry before a jury as herein provided for, it shall be lawful for the promoters of the undertaking to deposit the purchase-money or compensation payable in respect of such lands or interest therein, in the bank, in the name and with the privity of the Accountant-General of the Court of Chancery in England, or the Court of Exchequer in Ireland, to be placed, except in the cases herein otherwise provided for, to his account there, to the credit of the parties interested in such lands (describing them so far as the promoters of the undertaking can do), subject to the control and disposition of the said Court.

(*b*) 2 Mees. & Wels. 461.

1847.

POYNDER v. THE GREAT NORTHERN RAILWAY COMPANY.

yellow, was sufficient; for it showed that the Defendants required those lands for temporary purposes only, which was all that the Act required.

Mr. *Craig*, in reply, cited *Carter* v. *Ring* (c), in order to show that, as the money was secured by a bond, an action could not be brought for it unless a demand were previously made, and he submitted that the words, "as the case may require," ought to have been inserted in the condition.

The VICE-CHANCELLOR:

I see nothing in the Lands Clauses Consolidation Act that requires that the appointment of the surveyor should specify the particular lands to be valued; nor, as it seems to me, is there any necessity that it should do so; because the party at whose instance the surveyor has been appointed, is interested in seeing that the valuation is made of the right lands; for, otherwise, it would go for nothing. The sufficiency of the sureties in the bond, is not objected to by the bill; and the *Lord Chancellor* has decided, in *Bridges* v. *The Wilts, Somerset, and Weymouth Railway Company*, that they may be appointed without notice to the land-owner.*

The eighty-sixth section of the Act requires that the money to be deposited by way of security, shall be paid into the Bank, in the name and with the privity of the

* *Qu.*, Whether the bill did not rightly insist that the power of appointing sureties is given to the justices only *in case the parties differ;* and whether the inference to be drawn from those words, is not that the land-owner ought to have an opportunity of judging of the sufficiency of the sureties? See the argument in the case above referred to.

(c) 2 Campb. N. P. C. 459.

1847.

POYNDER v. THE GREAT NORTHERN RAILWAY COMPANY.

Accountant-General, to be placed to his account there, to the credit of the parties interested in or entitled to sell and convey the lands. And it appears, from the cashier's receipt, that the money in question has been so paid in, and that it has been placed to the account of the *Accountant-General* to the credit of *Ex parte the Great Northern Railway Company*, the account of the Plaintiff. It seems to me that that is a compliance with the words of the Act; for the money stands to the account of the party interested in the lands: and, that being the case, the introduction of the words: "*Ex parte the Great Northern Railway Company*," does not make that wrong which otherwise is right; for those words are nothing more than a description of the party by whom the money was paid in.

With respect to the objection that the money secured by the bond, ought not to have been made payable on demand, I have to observe that I have always understood the general rule to be that the bringing of an action is a demand: but I shall not finally dispose of that objection until I have ascertained whether there is a different rule where the money is due on a bond or other instrument under seal.

With regard to the objection made to the notice of July, 1847, I am of opinion that it ought to have stated for which of the four purposes mentioned in the Act under which it was served, the company required the piece of land to which it relates. That Act empowers the owner or occupier of the land referred to in the notice, to object, within a certain time, to the company making use of the land, on the ground that other lands lying contiguous or near to those proposed to be taken, would be more fitting to be used for the purposes of the

1847.

POYNDER v. THE GREAT NORTHERN RAILWAY COMPANY.

company. Therefore, the owner or occupier ought to know for which of the purposes mentioned in the Act, the company want his land; in order that he may be able to point out, at once, other lands which are better adapted to answer the purposes of the company. The consequence of the notice being in its present form, is to throw on the owner or occupier the burden of considering the grounds of objection with reference to each of the four purposes mentioned in the Act. Consequently, the injunction must be granted so far as the lands referred to in that notice are concerned.

The VICE-CHANCELLOR:

26th July. In the case of *Poynder* v. *The Great Northern Railway Company*, there was one question that was not disposed of; and that was whether the insertion of the words, "on demand," in the condition of the bond, was a substantial objection.

I have looked into the point, and my opinion is that it is a decided objection. Therefore, the injunction must go as to the lands containing three roods and two perches as well as those intended to be taken for temporary purposes.

Injunction granted until answer or further order.

The *Lord Chancellor*, on being moved to discharge the order, so far as it related to the lands containing three roods and two perches, continued the injunction *until the Defendants should give a bond in conformity to the provisions of the Lands Clauses Consolidation Act.*

1847.

POYNDER v. THE GREAT NORTHERN RAILWAY COMPANY.

The reason assigned by his Lordship for so continuing the injunction, was that the Defendants might be informed why it was continued, and how it might be got rid of. (*d*)

(*d*) See 2 Phill. 330.

1847: 29th July.

Will. Construction. 'Issue' construed 'Children.' Survivor or Survivors.

BENN *v.* DIXON. DIXON *v.* NICHOLSON. DIXON *v.* PRIESTLEY.

PETER DIXON made his will dated the 19th of November, 1822, in the following words:

"I give and bequeath unto my dear wife, *Sarah Dixon*, the whole of the interest arising out of my property, both real and personal, during the period of her natural life, and, at her decease, the same to be disposed of as hereafter named. I give and bequeath also unto my dear wife, *Sarah Dixon*, all my household furniture, linen, plate and books, to her for ever. At her decease, if I leave issue at my death, I give and bequeath the

Testator gave all his real and personal property to his wife for life, and at her death, if he left issue, to the child or children he might have at his decease; but, if he died without leaving issue, then he gave all his property, in equal proportions, to his brothers and sister, *Thomas*, *Anthony*, *John*, and *Jane*; and, if any of them should die without leaving issue, he gave such share or shares to the survivors or survivor of them; but if leaving issue, he gave such share to their children. The testator died without issue. *John* died a bachelor in his lifetime. *Jane* died in the lifetime of his widow, leaving one child and several grandchildren the issue of a deceased child. *Thomas* survived the widow and died leaving children. Then *Anthony* died a bachelor.

Held that the share intended for *John*, belonged, absolutely, to *Thomas*, *Anthony*, and *Jane*; that *Jane's* share belonged to her child; *Thomas's*, to his children; and *Anthony's*, to his real and personal representatives.

1847.

BENN v. DIXON. DIXON v. NICHOLSON. DIXON v. PRIESTLEY.

whole of my property, if to one child,* or, in equal shares, if more than one, on attaining the age of 21 years; the same being held in trust by *Richard Clapton*, *William Thompson*, and my dear wife, *Sarah Dixon*, for the use and benefit of such child or children I may have at the time of my decease. But should I die without leaving issue, then I give and bequeath, after the death of my dear wife, the whole of my property, both real and personal, in equal proportions, to my brothers, *Thomas Dixon*, *Anthony Dixon*, and *John Dixon*, and my sister, *Jane Benn*. But should any of my brothers or sister *die without leaving issue*, *I then give such share or shares to the survivor or survivors of them*; *but leaving issue*, *I then give such share to their children*, in equal proportions, on attaining the age of 21 years, to them and their heirs for ever. I appoint my dear wife executrix of this my last will and testament."

The testator died without issue.

The suit of *Benn* v. *Dixon* was instituted by the testator's sister and his brothers, *Thomas* and *Anthony*, against his widow and the children of *Thomas*, and the child and grandchildren of his sister, to have the trusts of his will carried into execution, and the interests of the parties in his property, declared.

In pursuance of the decree, the *Master* found that the testator's brother, *John*, died, a bachelor, in his lifetime: that his sister, *Jane Benn*, had one child, and his brother, *Thomas*, three children living at his death, but none born since: and that his brother, *Anthony*, was a

* *Sic.*

bachelor, and that the child of *Jane* and the children of *Thomas* had all attained 21.

On the cause coming on to be heard for further directions, the *Vice-Chancellor* declared that, according to the true construction of the will, the Plaintiffs were entitled, absolutely, in equal shares, to the one-fourth of the testator's property given to *John Dixon*, subject to the widow's life-interest.

Afterwards *Jane Benn* died, leaving her child and several grandchildren, the issue of a deceased child, her surviving. — Next the testator's widow died. — Then *Thomas Dixon* died leaving his three children surviving. Last of all, *Anthony Dixon* died a bachelor.

The suit having been revived, the questions were what interest *Jane*, *Thomas*, and *Anthony* took under the will.

Mr. *Simons* for *Thomas Dixon*, the younger, who was the heir and personal representative of his father, *Thomas*, and of his uncle, *Anthony*; and Mr. *Malins* for *Mary Benn*, the child of *Jane Benn*, contended that *Thomas*, *Anthony*, and *Jane* took the entire interest in the shares given to them; with an executory gift to their children in the event of their dying in the lifetime of the testator's widow. *Hervey* v. *MacLaughlin* (*a*).

Mr. *Baily* appeared for the grandchildren of *Jane Benn*.

(*a*) 1 Price, 264.

1847.

BENN
v.
DIXON.

DIXON
v.
NICHOLSON.

DIXON
v.
PRIESTLEY.

The VICE-CHANCELLOR:

My opinion is that the word 'issue,' means 'children;' and that the gift to the survivor or survivors is substitutionary; that is, if the brothers or the sister left children, their shares were to go to their children; but if not, to the survivors or survivor. At *Anthony's* death, there was no survivor to whom his share could go; and, consequently, his heir and personal representative are entitled to it. But the children of *Thomas* and the child of *Jane* are entitled to their parents' shares.

Declare that, according to the true construction of the will and in the events that have happened, *Thomas Dixon* the younger, as the personal representative of the late *Thomas Dixon*, is entitled to one-third of one-fourth of the funds in the cause and of the dividends accrued thereon since the decease of the testator's widow, and also to one-fourth of the dividends accrued thereon after the decease of the widow up to the decease of the late *Thomas Dixon:* and that *Thomas Dixon* the younger and the other children of the late *Thomas Dixon,* are entitled, in equal shares, to one-fourth of the same funds and of the dividends accrued thereon since the decease of the late *Thomas Dixon:* and that the defendants, the personal representatives of *Jane Benn,* are entitled to one-third of one-fourth of the same funds and of the dividends accrued thereon since the decease of the widow: and that the plaintiff, *Thomas Dixon,* as the personal representative of *Anthony Dixon,* is entitled to one-fourth and one-third of another fourth of the funds, (making together one-third) and to one-third of the dividends accrued thereon since the decease of the widow: and that the defendant, *Mary Benn,* is entitled

1847.

BENN
v.
DIXON.

DIXON
v.
NICHOLSON.

DIXON
v.
PRIESTLEY.

to one-fourth of the funds and of the dividends accrued thereon since the decease of the widow.—Costs of all parties to be taxed as between solicitor and client, and the amount to be raised out of one of the funds in the cause, and paid to the solicitors of the parties.—The *Master* to ascertain and certify the amount of legacy-duty payable in respect of the residue of the funds: the amount of it to be raised out of one of the funds, and paid to the solicitor of *Thomas Dixon* the younger, the solicitor undertaking to pay it to the proper officer in discharge of the legacy-duty: the *Master* to apportion the remainder of the funds amongst the parties, according to their rights before declared, and to certify the amounts so apportioned and to whom the same ought to be transferred and paid: Order the amounts to be transferred and paid accordingly: and any of the parties to be at liberty to apply.

Reeve v Reeve 3 Deg. & S. 717. Cowper v Mantell 22 Beav. 229. Cave v Cave 8 D. M. & G. 132. Thomas v Jones 2 J. & H. 481. In re Rudings Settlem.t 14 Eq. 270

STILLMAN *v.* WEEDON.

1848: 24th Nov. and 2nd Dec.

Stat. 7 *Will. IV.* & 1 *Vict.* c. 26. *Will. Appointment. Power. Construction.*

A., being entitled to a share of a testator's residuary estate, bequeathed *all the effects due to him from the estate*, to his nine children. The estate was then unadministered; but it was, afterwards, administered, and certain debts due to it were allotted to *A.* as his share of the residue. After which he settled the debts in trust for himself for life, remainder in trust for his sons and daughters or any of them, or any of their children, as he, from time to time, by deed or writing, *to be* by him duly executed and attested, or, by his will, should appoint. Held that, under the combined operation of the 24th and 27th sections of the late Will Act (7 Will. IV. & 1 Vict. c. 26,) the will, *though made before the power was created*, was a good execution of it.

JAMES STILLMAN made his will, dated the 18th of April 1845, and in the following words: "I dispose of all my real and freehold estates and all my personal estate and effects whatsoever and wheresoever, *and all effects due to me from the estate of the late Thomas Hedges*, to my nine children, to be disposed of in manner following, that is to say; first, I will and direct that all my just debts and funeral expenses to be fully paid and satisfied, and then all estates, effects, and moneys, whatsoever and wheresoever, to me did belong, shall be equally divided between my nine children, *Thomas Stillman*, *George Stillman*, *Ann Osbourne* wife of *William Osbourne*, *Hannah Casbourne* wife of *Charles Casbourne*, *Martha Smith* wife of *Benjamin Smith*, *Elizabeth Walker* widow, *Caroline Butler* wife of *John Butler*, and *Louisa Stillman*, to be by them enjoyed; and I hereby nominate *Thomas Stillman*, *George Stillman*, and *William Henry Smith* to be executors to this my last will and testament."

Hedges's estate was unadministered when *Stillman* made his will; but it was administered before the date of the deed after-mentioned, and he and his brother, who was the other residuary under *Hedges's* will, agreed that the following sums, namely, 700*l.*, 800*l.*, 700*l.*,

1848.

STILLMAN v. WEEDON.

500*l.*, and 100*l.*, some of which were due to *Hedges's* estate on mortgages of land and the rest, on assignments of the rates for watching and paving a town, should be allotted to him as part of his share of the residue. Afterwards *Hedges's* executors, by his desire, assigned and conveyed those sums and the securities for them, to *Timothy Weedon* and *John Weedon*. *Stillman* then executed a deed, dated the 9th of April, 1846, by which, after reciting the instruments by which the sums were secured, and that, under or by virtue of *Hedges's* will, dated the 4th of January 1839, he had become *possessed* of or entitled to those sums and the securities for the same, and that he was desirous of settling the same in the manner thereinafter expressed; and, after reciting the instruments by which the securities had been assigned to *T. Weedon* and *J. Weedon*, and that they were trustees, for him, of the sums due on those securities: he declared that *T.* and *J. Weedon* should stand possessed of the sums, in trust for such person or persons, for such intents and purposes, and with, under and subject to such powers, provisoes, agreements and declarations, and in such manner and form as he, from time to time, *or at any time or times thereafter*, by any deed or deeds, instrument or instruments in writing with or without power of revocation and new appointment, *to be* by him duly executed and attested, should direct, limit or appoint: and, in default of such direction limitation or appointment, in trust for himself for life, and, after his decease, in trust for his sons and daughters (all of whom he named) or any or either of them, or any or either of their children respectively, for such interest or interests, and in such parts, shares and proportions, and with such provisions for maintenance, education and advancement in life, at such ages, days or times, and with such restrictions, and in such manner and

1848.

STILLMAN v. WEEDON.

form *as he should, from time to time*, by any deed or deeds, instrument or instruments in writing, with or without power of revocation and new appointment, *to be* by him duly executed and attested, *or by his last will and testament* or any codicil or codicils thereto, direct, limit or appoint; and, in default of such direction limitation or appointment, in trust for his sons and daughters and their children who should attain twenty-one, as therein mentioned.

Stillman died on the 1st of January, 1848.

The securities for two of the sums comprised in the settlement, were changed in July and August 1847. The three other sums remained in their original state of investment.

The bill was filed by *Stillman's* sons and daughters, (three of whom were the executors of his will) against their children and the trustees of the settlement. It charged that the disposition contained in *Stillman's* will, had not been varied or altered by the settlement, in respect of the property therein comprised; or, if it had been, that, under the Act for the Amendment of the Laws with respect to Wills (7 Will. IV. & 1 Vict. c. 26) *his will must be taken as an execution of the special power of appointment amongst his children, contained in the settlement.* The answers submitted the question raised by the bill, to the judgment of the Court.

The following sections of the Act were referred to in the course of the argument.

The 23rd section enacts that no conveyance or other act made or done, subsequently to the execution of a will,

of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as thereinbefore mentioned, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will *at the time of his death.*

Section 24 enacts that every will shall be construed, with reference to the real estate and personal estate *comprised* in it, to speak and take effect *as if it had been executed immediately before the death of the testator*, unless a contrary intention shall appear by the will.

That part of section 27 which relates to bequests of personalty, enacts that a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate or any personal estate to which such description shall extend (as the case may be) *which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power*, unless a contrary intention shall appear by the will.

Mr. *Bethell* and Mr. *Bunny*, for the plaintiffs, referred to those sections of the Act, and said that the date of a will made, as the will in this case was, after the Act came into operation, was immaterial; for the Legislature had declared that such a will should pass the property of a testator, though subsequently acquired, and be a due execution of a power subsequently vested in him; and that the language of the Act could not have its full effect, unless the will was considered as having been executed immediately

1848.

STILLMAN v. WEEDON.

before the death of the testator; and, therefore, the Court was bound to hold the will in this case, to be an execution of the power reserved to the testator by the settlement, notwithstanding that power was not in existence at the date of the will. *Moor* v. *Raisbeck* (*a*), *Winter* v. *Winter* (*b*), *Lempriere* v. *Valpy* (*c*), and Hayes on Conveyancing (*d*).

Mr. *Rolt* and Mr. *Shapter* appeared for the Messrs. *Weedon*, the trustees of the settlement.

Mr. *K. Parker* and Mr. *Hughes* for the children of the plaintiffs, said, first, that if the will were considered to speak and take effect as if it had been executed immediately before *Stillman's* death, it would have no operation upon the property in dispute; for the bequest

(*a*) *Ante*, Vol. XII., page 123.

(*b*) 5 Hare, 306.

(*c*) *Ante*, Vol. V., page 108, and see *Curteis* v. *Kenrick*, *ante*, Vol. IX., page 443.

(*d*) Vol. I., page 392, fifth edition. The learned author says, in the passage referred to, that a general disposition by will is a tacit execution of all *general* powers (or, in other words, powers enabling the donee to appoint at his pleasure) whether existing and vested in the testator at the making of the will, or subsequently created or acquired. The power must, of course be testamentary; and the words of the statute, "in any manner he shall think proper," require that the power should be *unconfined in regard to objects*; for the statute *does not*, for instance, *render a general gift to the testator's children of force to pass property over which he has a special power of appointing in their favour*, notwithstanding the property should, in default of appointment be limited away.

This passage seems to be against the charge, *ante*, page 28, that the will must be taken as an execution of the special power of appointment amongst the testator's children, contained in the settlement.

which was said to pass that property, was specific, and the subject of it had been adeemed; inasmuch *Stillman* had reduced it into possession and transferred it to the trustees of the settlement, as appeared from the recitals in that instrument: secondly, that the 27th section of the Act, referred to a general and not to a specific bequest, and to a general and not a special power; and, though the settlement did contain a general power, the will could not be an execution of it; for it was to be exercised by an instrument operating in *Stillman's* lifetime and executed after the date of the settlement.

Mr. *Bethell*, in reply, said that the 24th section spoke of real and personal estate *comprised*, not 'described' in a will, and that the will in this case, did comprise the property which was, subsequently, comprised in the settlement and made the subject of the power.

The VICE-CHANCELLOR:

Before I decide this case, I wish to consider whether the words of the bequest can be construed as referring to the subject of that bequest in its transmuted form; for, if they can, Mr. *Parker's* objection, that the power referred to in the 27th section of the Act, is a general power, (*which, however, I do not think it is*) will be got rid of.

The VICE-CHANCELLOR:

2nd Dec.

The facts of this case are as follows—In the year 1839 *Thomas Hedges*, made his will, by which he gave the residue of his personal estate to *James Stillman* and his brother, *William Stillman*, in equal shares. He died in *March* 1845, and, on the 18th of *April* in that year, *James Stillman* made his will; and, by it, he disposed of

1848.

STILLMAN v. WEEDON.

all his real and freehold estates and all his personal estate whatsoever and wheresoever, and all the effects due to him from the estate of *Hedges*, amongst his nine children as tenants in common. In *April* 1846, an instrument was executed which recited the will of *Hedges*, and that his executors had come to an agreement, with *James Stillman*, that two sums secured on rates to be raised under a local Act of Parliament, and three sums secured on mortgage, should be taken as that portion of the personal estate of *Hedges* to which *James Stillman* was entitled. And then the instrument assigned those sums to trustees, in trust for such person or persons as *James Stillman*, from time to time or at any time or times thereafter, by any deed or deeds, instrument or instruments in writing with or without power of revocation and new appointment, to be by him duly executed and attested, should appoint, and, in default of appointment, in trust to pay the interest of those sums to himself for life; and, after his decease, in trust, as to the principal and the dividends and annual produce thereof, for his nine children or their children, for such interest or interests and in such parts, shares, and proportions as he should, from time to time, by any deed or deeds, instrument or instruments, in writing with or without power of revocation and new appointment, to be by him duly executed and attested, or by his last will and testament, appoint.

James Stillman died on the 1st of January, 1848: and the question is whether, having regard to the words of the will and the words of the last-mentioned power, the will is to be taken to be an execution of that power?

I was struck with the question, and thought it right

1848.

STILLMAN v. WEELDON.

to take time to consider it. And, having considered it, my deliberate opinion is that I am bound to hold the will to be an execution of the power.

The testator in the present case, died on the 1st of January, 1848, having, by his will, disposed of all the effects due to him from the estate of *Hedges*. Now the 24th section of the Statute 1st of Vict. c. 26, enacts that every will shall be construed to speak and take effect as if it had been executed immediately before the death of the testator. And the 27th section of the same Act enacts that every bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be) which he may have power to appoint in any manner he may think proper. The words are: "which he may have power:" and my opinion is that those words must be taken in connection with the former section, which prescribes the time when the will is to speak; and it is there expressly declared that the will shall speak from the death of the testator. Therefore the only possible question is whether, the testator having, as on the 1st of January, 1848, used the expression: "all the effects due to me from the estate of *Hedges*," those words could have been, before the passing of the Statute 1st Vict. c. 26, considered as an execution of the power in the deed, provided the will had been executed after the deed. And it appears to me that, although those sums were not, strictly speaking, due, yet no one can read the will without seeing that that expression describes the very sums which were made the subject of the deed of settlement.

Therefore I shall declare that the will is a due execu-

1848.

STILLMAN v. WEELDON.

tion of the second power in the settlement, and that the children of the testator are entitled.*

---

* His Honour seems to have thought that the power referred to in the 27th section of the Act, was not a general power. Perhaps he considered the words: "in any manner he may think proper," to mean: "by any instrument he may think proper."

The following heads of the judgment were in his Honour's own handwriting.

Will of *Hedges:* 4th January 1839. 13th March 1845, *Hedges* died. *James* and *Thomas Stillman* were residuary legatees of *Hedges*. *James Stillman's* will: 18th April 1845. "All effects due to me from the estate of the late *Thomas Hedges*," that is; "belonging to me as part of, or, as having formed part of the estate of the late *Thomas Hedges*." Settlement: 9th April 1846. The *choses in action* contained in the settlement, were allotted to *James* as his moiety of the residue. These effects are comprized in the will. By the 24th section, the will speaks as if made on the 1st of January 1848; and, by the 27th section, it operates as an execution of the power; because the terms used in the will, do refer to the subject of the power.

GRIFFITH *v.* GRIFFITH.*

1848: 10th Dec.

Dismissal. Practice. New Orders.

MOTION to dismiss for want of prosecution.

By the 111th General Order of May 1845, publication is to pass, without rule or order, on the expiration of two months after the filing of the replication; unless such time expires in the Long Vacation, or is enlarged by order: and one of the cases, mentioned in the 114th Order, in which a bill may be dismissed for want of prosecution, is if the Plaintiff, having obtained no order to enlarge the time, does not set down the cause to be heard and obtain and serve a *subpœna* to hear judgment, within four weeks after publication has passed.

In this case the Plaintiffs filed their replication and served a *subpœna* to rejoin in February 1845, but took no further proceeding in the cause.

Mr. *Oliver*, for the Defendant, now moved to dismiss the bill for want of prosecution. He contended that a replication and rejoinder were, together, equivalent to a replication under the Orders of May 1845; and, therefore, publication must be held to have passed, under the 111th Order, two months after the *subpœna* to rejoin was served.

The *Vice-Chancellor* held that, as the two months

A cause was put at issue, according to the old practice, more than two months before the Orders of May 1845 came into operation, but no further proceeding was taken in the cause.

Held that the defendant could not move to dismiss the bill for want of prosecution, under the 114th Order, section 4; but must set down the cause for hearing according to the old practice.

* *Ex Relatione.*

1848.

GRIFFITH v. GRIFFITH.

expired between the time when the *subpœna* to rejoin was served and the time when the Orders of May 1845 came into operation, the case was not within those Orders, but the Defendant ought to have set down the cause for hearing, according to the old practice.

1847: 26th July.

General Bequest. Will. Construction.

A bequest of all the property that the testator might die possessed of, held, from expressions in a codicil of even date, to pass only a part of the testator's property.

THE ATTORNEY-GENERAL *v.* WILTSHERE.

BISHOP *LUSCOMBE*, chaplain to the British embassy to the Court of *France*, by his will appointed three *English* gentlemen, two of whom he described as residing in *Paris*, trustees for the disposal of *all the property which he might die possessed of;* and desired that, as soon after his death as might be convenient to them, all his paintings, plate, furniture, books, linen, pendules *and every other article belonging to him*, should be sold, and that they should hold *all his property* for the purpose of founding one or more Scholarships in *Trinity College* near *Perth* in *Scotland*. If the produce of *the articles above-mentioned* should produce an interest of more than 100*l.* a-year, he desired the sum to be equally divided between two scholars; if not, the whole to be given to one scholar: and he directed the above-mentioned trustees, as soon after his death as possible, to transfer the amount for which his property should have been sold, to the bishops in *Scotland*, to be by them invested in the *English* funds, in the names of as many of them as should be necessary; and that the interest should be applied as he had above mentioned.

He added that *the property above referred to* was in No. 19, *Rue de Vignes, Paris.*

The testator made a codicil of the same date as his will, and, after mentioning that he had ten thousand francs in a bank in *Paris*, a balance in a bank in *London*, and an inscription of five thousand francs in the *French* £5 per Cents., he bequeathed all those sums to *Emma Horsford.*

The testator, at the date of his will and at his death, was entitled to 5000*l.* Consols standing in the names of trustees, in addition to the property mentioned in his will and codicil; but, it was alleged, he was ignorant of that fact.

The question was whether the Consols passed, by the will, to the trustees.

Mr. *Twiss* and Mr. *Borrett* for the *Attorney-General*, said that the words of the will, were sufficient to pass the Consols, though the testator was not aware that he was entitled to them; that the words, "the property above referred to," meant the specified articles, and did not limit the meaning of the previous words, "all my property." They added that the testator intended to found two scholarships; but that there would not be sufficient property for that purpose, unless the Consols were held to pass by the will; *Kendall* v. *Kendall* (*a*).

Mr. *Eade* for the testator's executors, said that if the Consols did not pass by the will, there would be an intestacy as to them.

(*a*) 4 Russell, 360.

1847.

ATTORNEY-GENERAL v. WILTSHERE.

Mr. *Cooper* and Mr. *Lewis* appeared to oppose the claim made on behalf of the *Attorney-General:* but

The *Vice-Chancellor*, without hearing them, said that, taking the whole of the will together, it was quite clear that the testator intended to dispose of nothing by it, except the articles in the house No. 19 *Rue de Vignes, Paris:* and that that construction was confirmed by the codicil; for it proved that the testator considered that he had not disposed of the whole of his property by his will; which he would have done, if a limited construction were not put upon the words: "all the property I may die possessed of."

Declare that nothing passed to the trustees of the will, except the testator's property in the house No. 19 *Rue de Vignes, Paris.*

BISHOP *v.* COLEBROOK.

1847: 29th July.

Husband and Wife. Married Woman. Chose in Action. Reversionary Interest.

BY the settlement on the marriage of the Plaintiffs, Mr. and Mrs. *Bishop*, a sum of Consols, belonging to the lady, was settled in trust for Mr. *Bishop* for life, remainder in trust for Mrs. *Bishop*, absolutely, if she should survive her husband; but, if she should not, in trust for such persons &c. as she should by deed or will appoint, and, in default of appointment, in trust for her executors or administrators. After the marriage Mr. *Bishop* became bankrupt; and his assignees sold his life-interest in the Consols to one *Ellis*. Some years afterwards, *Ellis*, in consideration of 211*l.*, assigned his interest in the Consols to Mrs. *Bishop*, to the intent that it might become merged and that the Consols might become absolutely vested in her in possession; and she, in exercise of the power in the settlement, directed that, in the event of her dying in her husband's lifetime, the Consols should be transferred to her, her executors or administrators as part of her personal estate. The bill prayed that the fund might be transferred to Mr. *Bishop*.

Mr. *Cooper* for the plaintiffs, cited *Hall* v. *Hugonin* (*a*).

Mr. *Teed* and Mr. *E. F. Smith* for the trustee, distinguished the principal case from the case cited, and from *Creed* v. *Perry* (*b*), on the ground that the tenant for life of the fund, was the husband of the lady; and they cited *Pickard* v. *Roberts* (*c*).

A sum of stock was vested in a trustee in trust for *A.* for life, remainder in trust for his wife, absolutely. *A.* became bankrupt; and his assignees sold his life-interest to *E.* Some years afterwards, *E.*, for valuable consideration, assigned the life-interest to the wife. And, on her appearing in Court and consenting, the *Vice-Chancellor* ordered the trustee to transfer the fund to her husband. But the *Lord Chancellor*, in a subsequent case, overruled the principle of the decision.

(*a*) *Ante*, Vol. XIV., p. 595.
(*b*) Ibid. 592. (*c*) 3 Madd. 384.

Nanchett v Briscoe 22 Beav. 505.

1847.

BISHOP v. COLEBROOK.

The *Vice-Chancellor* said that Mrs. *Bishop* had the whole interest in the Consols, both in possession and in reversion, vested in her; and therefore, he had not the least difficulty in ordering the trustee, according to the prayer of the bill, to transfer the fund, to Mr. *Bishop*, (who had obtained his certificate,) on his wife appearing in Court and consenting.

In *Whittle* v. *Henning*, *Lord Langdale*, Master of the Rolls, refused to follow *Creed* v. *Perry*, *Hall* v. *Hugonin* and the other cases of the like nature contained in the 14th volume of these Reports; and the *Lord Chancellor*, on appeal, overruled them, and affirmed *Lord Langdale's* decree.—22nd December, 1848.*

* The reporter abstained from reporting the cases mentioned in the note to *Creed* v. *Perry*, because the decisions in them were generally considered unsound.

FINDEN *v.* STEPHENS.

1847: 2nd August.

Costs. Motion. New Orders.

The costs of an interlocutory proceeding, are not costs of the suit.

PETITION, by the Plaintiff, for leave to except to the report of the *Taxing-Master* who had allowed the Defendant the costs of preparing to resist a motion in the cause, for an injunction.

On the motion being brought on, the Court, at the Defendant's request, ordered it to stand over until a certain day, in order to enable the Defendant to answer an affidavit in support of it. Before that day arrived, the Defendant filed a demurrer to the whole bill for want of equity; which the *Vice-Chancellor* overruled, but the

1847.

FINDEN v. STEPHENS.

Lord Chancellor, on appeal, allowed, and, pursuant to the 45th Order of May 1845, ordered the Plaintiff to pay the Defendant the costs of it and *the costs of the suit* also.

Mr. *Bethell* and Mr. *Moxon*, in support of the petition, said that the costs of an interlocutory application, were not costs of suit. They referred to the rules laid down, by Sir *John Leach*, relative to costs (*a*), and to *Lewis* v. *Armstrong* (*b*) and *Farquharson* v. *Pitcher* (*c*).

Mr. *Stuart* and Mr. *Bazalgette*, for the Defendant, cited *Dugdale* v. *Hare* (*d*).

The VICE-CHANCELLOR:

The *Lord Chancellor* ordered the Plaintiff to pay the Defendant his costs of the demurrer and also his costs of the suit; and, if his Lordship had been asked to include the Defendant's costs of the motion, in his order, he, probably, would have done so. The order, however, says nothing about those costs; and, therefore, I think that the *Taxing-Master* ought not to have allowed them: for, I have always understood that the costs of proceedings in a suit which are necessary to bring it to a hearing, are costs of suit; but that the costs of interlocutory proceedings are not. The consequence is that the costs objected to, must be disallowed, and the *Master's* certificate reduced accordingly.

(*a*) 1 Sim. & Stu. 357.
(*b*) 3 Myl. & Keen, 69.
(*c*) 4 Russ. 510.
(*d*) 5 Hare, 92.

1847:
12th Nov.

Infant.

A female infant entitled to a fund in Court, was resident abroad, with a guardian appointed by a foreign Court. The *Vice-Chancellor* ordered the dividends of the fund to be paid to her solicitor, he undertaking to remit them to the guardian.

IN RE MORRISON AN INFANT.

A FEMALE infant, resident in the *United States*, had no guardian in this country, but had a guardian, appointed by a Court in *America*, with whom she resided.

The *Vice-Chancellor*, on the hearing of a petition presented by her, ordered the dividends of a fund in Court (531*l.* Consols) to which she was entitled, to be paid to Mr. *Ward*, a solicitor of the Court, and who was her solicitor, he undertaking to remit them to her guardian in *America*.

Mr. *Stuart* appeared for the Petitioner.

1847:
13th Nov.

Patent.
Pleading.

A patentee filed a bill against a person whom he had licensed to use his invention and the partner of the latter, for an account on the footing of the licence, and for an injunction to restrain the Defendants from using the invention in case they should dispute his right to the payments reserved by the licence on the ground that the licence had become void. A general demurrer to the bill was overruled.

HADDAN *v.* SMITH AND WILLEY.

IN April 1844, the Plaintiff, being the proprietor of a patent for certain improvements in the construction of wheels for railway carriages, granted a licence to *Smith* to use his invention on payment of a certain sum or royalty for every wheel made according to the patent, and the licence was to be void in the event of *Smith* taking a partner: but that provision was afterwards

dispensed with, on the occasion of *Smith* taking *Willey* into partnership.

The bill, after stating as above and alleging that the Defendants, though they had continued to use the Plaintiff's invention, had not paid him any royalties since the 31st of March 1846, set forth a correspondence between the parties and then added that, though the Defendants, throughout that correspondence, never set up any such pretext: "they now pretend the said letters patent, the subject of such licence, to be void, and that they are released from the obligations of the said licence accordingly; and sometimes they pretend the said licence to have terminated by the formation of the partnership between them;" but the Plaintiff charged the contrary of such pretences to be true, and that the provision as to the avoidance of the licence in the event of *Smith* taking a partner, had been dispensed with on the occasion before mentioned.

The bill prayed for an account and payment of what was due, from the Defendants to the Plaintiff, in respect of the royalties payable under the licence: and that, in case the Defendants should dispute the Plaintiff's right to payment of royalties under the licence by reason of the invalidity of the patent, the determination of the licence or otherwise, then that the Defendants might, in the mean time, be restrained, by the injunction of the Court, from all future manufacture and sale of the wheels the subject of the patent.

Mr. *Bethell* and Mr. *Campbell*, in support of a general demurrer, said that one part of the relief prayed by the bill, was inconsistent with the other part; for

1847.

HADDAN v. SMITH AND WILLEY.

the account was sought on the ground that the licence was good, and the injunction, on the ground that it was void; and that two causes of suit which were inconsistent with each other, could not be contained in the same bill.

Mr. *Stuart*, Mr. *Goodeve*, and Mr. *Hindmarch* appeared in support of the bill.

The VICE-CHANCELLOR:

It strikes me that the bill is framed in such a way as to raise the question, not whether the licence is void, but whether a contract made by the Plaintiff and one of the Defendants is, under the circumstances stated, binding on the other Defendant also. If it is not, they are both acting without the authority of the Plaintiff, and he is entitled to his injunction. Therefore, the demurrer must be overruled.

1847:
13th Nov.

GOUGH *v.* BULT.

Legacy and Legatee. Will. Construction.

JOHN BULT, by his will dated the 5th of June 1819, after bequeathing several pecuniary legacies and giving certain freehold and leasehold messuages to trustees in trust for his daughter *Hannah Meredith* and his sons, *John* and *Samuel*, for their lives and, after their deaths, for their children who should attain twenty-one, and making provision for their maintenance and advancement, gave all his other leasehold messuages to the same trustees, in trust to receive the rents and pay the same to his wife, for her separate use, for life: and, after reciting that he had not, theretofore, made any provision, by his will, for raising a particular capital or sum for enabling his said sons to begin and carry on business; and that he might not have sufficient ready money or stock in the funds or other securities, to pay the legacies thereby bequeathed, and his funeral and testamentary expenses; he *ordered* and empowered his trustees, *at their free will and pleasure and without the consent of his wife*, to sell so many and such of his messuages lastly thereinbefore given or intended for the benefit of his wife, so that her income under his will should, in no case, be reduced under the clear yearly sum of 500*l.*, according to the then rental, dividends and annual produce of his said property bequeathed for her benefit; and to pay and apply *such part* of the moneys to arise from such sale, *not exceeding* 2000*l.*, to each of his said sons, *for setting them or either of them up in business, or for such other purposes as his wife should think proper and most beneficial for them*, and to apply the residue of such moneys, if

Testator ordered and empowered the trustees of his will, at their free will and pleasure, to sell part of the trust-property, and, out of the proceeds, to pay *not exceeding* 2000*l.* to his son, *for setting him up in business, or for such other purposes as the testator's wife should think proper and most beneficial to him.* The son survived the testator, and afterwards died without having entered into business, and without the 2000*l.*, or any part of it, having been raised.

A general demurrer to a bill filed, by his personal representative, to have the 2000*l.* raised, was overruled.

1847.

GOUGH v. BULT.

required, in aid of the legacies thereinbefore given, and, also, in payment of the debts (if any) which he might owe at his death, and of his funeral expenses and the charges of proving his will or incident thereto: and he declared that the sum or sums which, under the provision last aforesaid, might be advanced or paid to both or either of his sons or for their use, should be considered as so much of the residue, and only as so much of the residue of his estate and effects as they, respectively, would otherwise be entitled to under his will, and not as part of any premises or property otherwise given to them thereby: and he gave all the messuages of which his wife was to receive the rents during her life, subject as aforesaid, to the trustees, in trust, after her death, to sell the same or such and so many of them as should not have been sold pursuant to the power thereinbefore for that purpose contained, and to stand possessed of the produce in trust, as to one fourth, for his son *John*, as to one moiety of the remainder, for his son *Samuel*, and, as to the other moiety, for his daughter, *Hannah Meredith*: and he directed that, if any of them should die in the lifetime of his wife leaving issue, their shares of the moneys to arise by the last-mentioned sale, should be in trust for such of their issue as should attain twenty-one, share and share alike; but, if any of them should die in the lifetime of his wife without leaving issue, then their shares should be paid to and equally divided between such of them as should be living at the death of his wife; and, if all of them should die in the lifetime of his wife without leaving issue, then that the produce of his last-mentioned messuages, should sink into the residue of his estate: and he gave such residue to the trustees, in trust for his wife, for life, and, after her death, in certain shares, for his sons and daughter for their lives and, after their deaths, for their children who should attain

twenty-one, and if all of them should die without issue in the lifetime of his wife, then in trust for the next of kin of his sister and brothers therein named.

The testator died in 1823 leaving his wife and his sons and daughter surviving. His general personal estate was much more than sufficient to pay his debts, funera and testamentary expenses and legacies. His widow's income under his will, was 1200*l.* a year. In pursuance of an arrangement between her and the trustees, 2000*l.* was raised out of the testator's residuary property, as a capital to enable *Samuel* to enter into business: but, though *John* attained twenty-one, nothing was raised for him, because, as the bill alleged, the widow *claimed to exercise a discretion as to whether the* 2000*l. or any part of it should or should not be raised for him*, and she determined that it should not. She, however, for some years after the testator's death, paid him 100*l.* a year, being, as the bill alleged, interest at five per cent. upon 2000*l.* He died in 1832 without issue. In May 1847, up to which time he was unrepresented, the Plaintiff took out administration to him.

The bill, which was filed against the trustees and executors of the will and the testator's widow and surviving children, after stating as above, charged that the widow, by raising and paying 2000*l.* for *Samuel* and paying interest on the like sum to *John*, did exercise her discretion (so far as she had any) as to the amount of the provision for them, and did determine (so far as it lay in her to determine) that it was proper and most beneficial, for *John*, that he should have the full sum of 2000*l.* but that the same should continue a charge upon the property producing him such interest as aforesaid. The

1847.

GOUGH v. BULT.

bill prayed that 2000*l.* with interest since the last payment of interest to *John*, might be raised by sale of a competent part of the messuages bequeathed in trust for the widow for life, and be paid to the Plaintiff as *John's* personal representative.

Mr. *Stuart* and Mr. *Stinton*, in support of a general demurrer, said that the claim made by the bill, could not be supported; for, first, the sum to be raised for *John*, was intended for his personal benefit, and, therefore, it could not be raised after his death: secondly, that *John*, if he had been living, could not have claimed to have 2000*l.* or any other precise sum raised for him; for all that the will said respecting the amount of the sum, was that it should *not exceed* 2000*l.*, which was too indefinite to support a claim.

Mr. *Bethell*, Mr. *Rolt*, and Mr. *James*, in support of the bill, said that the discretion given to the widow, was not as to *the amount* of the sum to be raised, but as to *the purpose* for which it was to be applied; that the testator *ordered* his trustees, and, therefore, made it imperative upon them to raise 2000*l.* for each of his sons; and, though he afterwards expressed certain purposes for which those sums were to be applied, the expression of those purposes did not prevent the sons from being entitled to them absolutely.

Mr. *Stuart*, in reply, said that, in determining the question raised by the demurrer, the gift of the residue must be looked at; and that that gift plainly showed that the testator did not intend to deprive *John's* children (if he left any) of the 2000*l.*, unless it were raised in his lifetime.

1847.

GOUGH v. BULT.

The VICE-CHANCELLOR:

It is the duty of the Court to give a natural interpretation to the words of an instrument; and subsequent events cannot alter the rights of parties under it.

If, at the time when the testator died, *John* had a right to say, to the trustees: "Raise 2000*l.* and pay it to me for the purpose of enabling me to go into business or for such other purpose as my mother shall think proper," my opinion is it would have been the duty of the trustees to raise the 2000*l.* Because, I cannot think that no sum was to be raised, merely because the expression is: "any sum not exceeding 2000*l.*" It seems to me that it would be quite ridiculous to say that, because they had not fixed the sum, therefore, nothing was to be raised: and I think that *John* had a right, *primâ facie*, to have 2000*l.* raised, unless some other sum was fixed upon.

It does not appear that the mother had any discretion vested in her as to the amount that was to be raised. But it is as plain as words can make it that the discretion given to her extended only to the purposes to which the sum, when raised, was to be applied.

If the testator intended that the discretion of his wife should operate not merely on the application of the money, but also upon the raising of it, I cannot give effect to that intention, because he has not expressed it.

Whatever right *John* had when the testator died, vested, on his death, in his personal representative: and though it happened that the trust was not exercised, yet a vested right remained to have it exercised.

1847.

GOUGH v. BULT.

My opinion is that the words gave *John* a vested right to have the 2000*l.* raised; and, therefore, I shall overrule the demurrer.

1848: 2nd May.

The Plaintiffs appealed to the *Lord Chancellor* from the Order overruling the demurrer.

His Lordship, after adverting to the direction to sell part of the messuages bequeathed in trust for the wife, and to the previous provisions of the will, said:

It is to be observed that, in this direction to sell, the testator had in view, not only the putting of his sons out in business, but the payment of his legacies and debts. And he directs his trustees to sell without the consent of his wife; so that he entirely guards those who were the objects of his bounty against any improper interference on her part to prevent the sale. He not only gives, to the trustees, a power of sale independent of the wife; but he *orders* them to sell. The testator next directs the trustees: "to pay and apply such parts of the money to arise from such sale, not exceeding 2000*l.*, to each of my said sons, for setting them or either of them up in business, or for such other purpose as my said wife shall think proper and most beneficial for my said sons; and to pay the residue of such purchase monies, if required, in aid of the legacies hereinbefore by me given, and also in payment of the debts, if any, which I may owe at the time of my death, and of my funeral expenses and charges of proving this my will and incident thereto." He then gives the residue to the wife for life, and gives a certain portion of it to *John*; but *John* was not to take it except in the event of his

surviving his mother. If he had children, it was to go to them; but, if he had none and did not survive his mother, it was to be divided among the other residuary legatees.

The son never did enter into business; and he died in the lifetime of his mother, without children. The question is whether, under this will, he was, in his lifetime, and, consequently, the present Plaintiff, as his personal representative, now is entitled to *any* provision under this bequest; because, if he was entitled to *any*, the demurrer cannot be supported.

In support of the demurrer, it was said that the provision being intended for setting him up in business, and he never having entered into business, the occasion did not arise on which he could have a claim to any part of the 2000*l.*; and also that it was a matter of discretion to be exercised by the trustees or by the widow; and that, that discretion not having been exercised beneficially for him in his lifetime, there is no claim now on the behalf of his personal representative. In support of that proposition it was said that the expression: "as my wife shall think proper," over-rides the whole sentence; 'such' being a word of reference, and it being, therefore, necessary to find something for it to refer to; that the trustees were to apply such part as the wife should think proper; leaving, therefore, the amount of the money to be raised, as well as the application of it, at her discretion.

Certainly, the sentence is not perfect as it stands; but *that* would not be a very rational construction or one consistent with the declared intention of the testator: because he had, before, put the raising of the money,

1847.

GOUGH v. BULT.

If that is the right construction, there is no doubt that the testator has given them a present interest in the money to be raised, though the application of it was to be regulated by the discretion of his wife. For it is a well-known rule that, where a legacy is given, but the application of it is prescribed by the testator himself or left by him to the discretion of some other person, if that discretion is not exercised or an accident happens which prevents the employment of it in the way which is contemplated, the gift prevails. The mode of application may fail, but that will not interfere with the substance of the gift.

As there is an imperative trust to raise not exceeding a certain sum, and to pay it to the son; and as the only mode of applying it has failed, I think that the *Vice-Chancellor* was right.

What I have said is, of course, entirely independent of what defence may arise in the suit: but it appears to me, on the construction of the will, that *John* had a present interest in *some* sum of money at least, to be raised out of the estate.

Appeal dismissed, with costs.

WEBB *v.* WEBB.

1847: 16th Nov.

Costs.
Trustees.

Two trustees severed in their defence: one was charged with misconduct, but not the other. The Court allowed only one set of costs and gave the whole of them to the innocent trustee.

IN this cause two trustees, *Webb* and *Yates*, had employed separate solicitors and put in separate answers. *Webb* had misapplied the trust-funds, but no imputation was cast upon *Yates*.

The *Vice-Chancellor* said that *Yates* was justified in severing in his defence from *Webb*, and that there must be only one set of costs, and the whole of them must be paid to *Yates's* solicitor.

Mr. *Stuart*, Mr. *Bethell*, Mr. *Willcock*, Mr. *Rogers*, Mr. *Hingeston* and Mr. *Speed* were the Counsel in the cause.

ROBERTS *v.* MADOCKS.

1847: 16th Nov.

Plea.
Pleading.
Negative Plea.

Where a Plaintiff sues as executor, but the probate is insufficiently stamped, the Defendant, if he affirmatively, in pleads to the bill, ought not to state matters order to show the insufficiency of the stamp, but ought to plead, simply, that the Plaintiff is not executor.

PLEA to a bill of revivor filed by the executrix of the Plaintiff in the original suit, that the probate-copy of his will was insufficiently stamped.

The plea set forth the sections of the Stamp Acts, 9 & 10 Will. III. c. 25, and 55 Geo. III. c. 184, and part of the schedule to the latter; from which it appeared that the probate-duty payable where the assets of a testator

1847.

ROBERTS v. MADOCKS.

are of the value of 4000*l.* and under the value of 5000*l.*, is 80*l.*, and that a larger sum is payable where the assets amount to or exceed 5000*l.*; and the plea averred that the sum sought to be recovered from the Defendant, exceeded 5000*l.*, but the duty paid by the executrix on proving the late Plaintiff's will, was only 80*l.*

Mr. *Stuart* and Mr. *Craig*, in support of the plea, cited *Hunt* v. *Stevens* (*a*), *Carr* v. *Roberts* (*b*), *Christian* v. *Devereux* (*c*), and *Simons* v. *Milman* (*d*).

[The *Vice-Chancellor*.—Why did you not plead, simply, that there was no probate?]

Because there is a probate, and the plea is put in on oath.

[The *Vice-Chancellor*.—The bill of revivor avers that the Plaintiff has duly proved the will, and that she has thereby become and now is the sole legal personal representative of the testator. Why did you not plead that she had not duly proved the will and was not the legal personal representative of the testator?]

Because she has duly proved the will and is the legal personal representative of the testator for the purpose of recovering any sum less than 5000*l.*, and the amount of her demand does not appear on the bill of revivor. So that if the plea had been in the form suggested by your Honour, and had been replied to, the Plaintiff would have had nothing to do but to produce the probate; and, the insufficiency of the stamp not being put in issue,

(*a*) 3 Taunt. 113.
(*b*) 2 Barn. & Adol. 905.
(*c*) *Ante*, Vol. XII., p. 264.
(*d*) *Ante*, Vol. II., p. 241.

the Defendant could not enter into evidence to prove that it was insufficient. The plea shows, as every plea of the like nature ought to do, what the matter of fact is which Defendant means to plead in bar to the bill.

Mr. *Bethell*, Mr. *James Parker* and Mr. *Renshaw* appeared in support of the bill; but

The VICE-CHANCELLOR, without hearing them, said:

The question is whether the plea is right in form, that is, whether, where a plea is, in substance, a negative plea, it is right to plead a variety of matters affirmatively, in order to come to the negative conclusion that there is no executor.

Suppose that a bill were filed by a person claiming an estate as heir to the person last seised; would it be right, instead of pleading that the claimant was not heir, to enter into a long genealogical history to show that *John Smith*, and not the Plaintiff, was the heir?

If the Defendant in this case, had pleaded that the Plaintiff was not the executrix or not the legal personal representative of the deceased, it would have been perfectly good; and, if it had been replied to, the probate must have been produced; and then it would have appeared, from the original bill and the probate taken together, that the stamp was not sufficient to cover the amount of the demand.

My opinion is that negative matter ought to be pleaded negatively: and, therefore, I shall overrule this plea.

Espey v Lake 10 Hare 261.
Dettmar v Metropolitan & Provincial Bank 1 H. & M. 654.
Rhodes v Bate 1 Law Rep. Ch. Ap 255

1847: 18th Nov.

Fraud. Undue Influence. Guardian and Ward. Promissory Note.

Two years and a half after a young lady had come of age, *A.*, who had been her guardian, and with whom she still resided, drew a promissory note in her favour, and she, at his request, indorsed it.

Shortly afterwards, a third person paid the note to his bankers, (who knew that *A.* was insolvent and had been the young lady's guardian,) and they, on the faith of the indorsement, paid a cheque which he had drawn in favour of *A.*

The Court restrained the bankers from suing the young lady on the note, and would not order her to pay the amount of it into Court.

MAITLAND *v.* BACKHOUSE.

THIS case, like *Maitland* v. *Irving* (reported *ante*, Vol. XV. page 437), arose out of a transaction between Miss *Maitland* and Mr. *Maclean*. That transaction, as represented by the bill, was as follows:—On the 9th of March 1846, *Maclean* (who was then residing with his family, including the Plaintiff, at *Wilton Castle*, his country-house, near *Bishop Auckland* in *Durham*,) drew a promissory note for 5000*l.*, payable to the Plaintiff or her order, six months after date, at the *London* and *County* Bank in *Lombard Street* in *London*, and brought it to the Plaintiff, and asked her to sign her name at the back of it. At that time *Maclean* was largely indebted to the Plaintiff; and, as the note appeared to be a provision for payment of money by him to her, and not by her to any other person, she supposed that her signature was required as a receipt or acknowledgment for *Maclean's* undertaking to pay her the amount: and, under those circumstances, and being under *Maclean's* influence and accustomed to act entirely under his guidance and to do as he suggested, she signed her name at the back of the note, without making any inquiry and without receiving any consideration for so doing; and *Maclean* then took the note and delivered it to Messrs. *Bolkow* and *Vaughan*, (iron-masters in the neighbourhood of his residence with whom he had had dealings;) and they, shortly afterwards, paid it to or deposited it with their bankers, Messrs. *Backhouse* of *Bishop Auckland*. The Messrs. *Backhouse* were *Maclean's* bankers also; and, at the time when they took the note, they knew that he was in embarrassed circum-

stances, and were well acquainted with all the particulars of the connection between him and the Plaintiff and of the position in which she then stood and had stood with regard to him.

In June 1846, *Maclean* became bankrupt. In October following Messrs. *Backhouse* brought an action against the Plaintiff on the note.

In January 1847 the bill was filed to restrain them from proceeding with their action.

After the injunction had been granted, Messrs. *Backhouse* put in their answer. They said that, when they discounted the note as after-mentioned, they had no knowledge, information or suspicion of the circumstances under which the Plaintiff was stated to have indorsed it, or that she had received no consideration for so doing; but they admitted that they had been informed that she was related to *Maclean;* that he had been her guardian, and that she had resided with him for some years, and was entitled to a fortune of 60,000*l.* or 80,000*l.* They admitted also that, before the note came into their possession, they had refused to discount *Maclean's* bills, and that they knew he was in embarrassed circumstances, and that they discounted the note on the faith of the Plaintiff's indorsement. They added that, on the 9th of March 1846, *Bolkow* and *Vaughan* drew a check, on them, for 2000*l.*, in favour of *Maclean*, which was presented through the *London* Joint-stock Bank, and was dishonoured by them, because *Bolkow* and *Vaughan's* account with them was then over-drawn: that, on the 12th of the same month, *Bolkow* and *Vaughan* handed them the promissory note indorsed by the Plaintiff, in order to induce them to pay the check, and they then

1847.

MAITLAND v. BACKHOUSE.

received the note and held the same on account of *Bolkow* and *Vaughan* until it was discounted as aftermentioned; and, on the faith of it, they paid the check on the 13th of March, through their *London* agents, to the party holding it; and that, on the 6th of May following, they discounted the note for *Bolkow* and *Vaughan*, at their request, and charged them with 86*l.* 6*s.* 1*d.* for such discount, and gave them credit, as on that day, in their account, for the amount of the note: that *Bolkow* and *Vaughan* were, at that time and had continued ever since, indebted to them to an amount greater than the amount of the note: that, when the note was brought to them, they inquired, of *Bolkow*, what was the age of the Plaintiff and what property she had, and that he stated that she had come of age some time previously and had property amounting to 80,000*l.* or thereabouts; and that, before they discounted the note, they made some inquiries, from one *William Trotter* and other persons, as to the correctness of *Bolkow's* statement; but what inquiries in particular, or, save as aforesaid, of whom or at what time such inquiries were made, they could not set forth; "but the same were made with reference to the matters appearing in their answer, and not otherwise to the matters mentioned in the bill;" and that the result of such inquiries confirmed *Bolkow's* statement; and the Defendants discounted the note accordingly: that, by paying the check for 2000*l.* and giving *Bolkow* and *Vaughan* credit for the amount of the note, they gave a consideration for it and for the Plaintiff's indorsement of it: that the note, when received by the Defendants, was held on account of *Bolkow* and *Vaughan*, short, and as an amount to be received on their account when due, and as a deposit to secure the check for 2000*l.* paid by the Defendants as before-mentioned, until the 6th of May

1846, when the amount of it was credited to *Bolkow* and *Vaughan*; and that the Defendants claimed to be purchasers and indorsees of the note for value, without notice of any of the matters on which the Plaintiff relied as freeing her from liability in respect of her indorsement.

Mr. *Bethell* and Mr. *Bazalgette*, on showing cause against dissolving the injunction, cited *Irving* v. *Maitland* (*a*).

Mr. *Rolt*, and Mr. *Cairns*, for the Messrs. *Backhouse*, said that, in the case cited, it was clear that the guarantee, and the check and note which were substituted for it, were given without consideration: that, in *Archer* v. *Hudson* (*b*), the transaction between the uncle and niece, took place almost immediately after the latter came of age, and the Manager of the Banking Company was not only privy but a party to it: that, in the present case, the Plaintiff was in her twenty-third year when the transaction between her and *Maclean* took place, and the *Backhouses* were neither parties nor privy to it: that there was nothing, in the answer, to show that the Plaintiff had any equity even against *Maclean*; and that the Court could not continue the injunction unless it was shown that such an equity existed, and also that the *Backhouses* had notice of it: that they received the note in the usual course of their business; and it was not at all improbable that *Maclean*, when he signed it, owed the Plaintiff the amount of it; at all events, there was nothing in the answer from which it appeared or could be inferred that he was not indebted to her, or that she did not receive value for the note from *Bolkow*

(*a*) *Ante*, Vol. XV., p. 437. (*b*) 7 Beav. 551.

1847.

MAITLAND v. BACKHOUSE.

and *Vaughan*; and consequently the injunction could not be sustained.

The VICE-CHANCELLOR:

I shall continue the injunction: for, this is a case in which it is evidently necessary that there should be further inquiry.

Some of the facts are quite undisputed.—It appears that it had come to the knowledge of the Messrs. *Backhouse*, that the young lady had been a ward of Mr. *Maclean's*; that she lived with him, and that she attained the age of twenty-one in September 1844. It appears also that they knew, before the year 1846, that *Maclean* was in difficulties; and that they knew it from transactions between themselves and him. They had also information that the young lady had considerable property. Then it appears that they were the bankers of *Bolkow* and *Vaughan*; and that *Bolkow* and *Vaughan* produced to them the promissory note in question. At that time, the state of the accounts between them and *Bolkow* and *Vaughan*, was such that *Bolkow* and *Vaughan* were indebted to them in a large sum of money. They state that they did not immediately discount the note; but that they caused some inquiries to be made; and they learned that the young lady was of age and had property. Then, on the 6th of May, that operation took place which, in their answer, they describe as an operation of discount; by which the sum of 86*l.* 6*s.* 1*d.* was taken from the amount of the bill, by way of discount, and the remainder was carried to the credit of *Bolkow* and *Vaughan*. It appears, however, from the books of Messrs. *Backhouse*, that the transaction was nothing like a transaction of discount; for the whole sum seems to have been carried to the credit

1847.

MAITLAND v. BACKHOUSE.

of *Bolkow* and *Vaughan*, and the balance which was due from them on the previous day, was reduced, exactly, by the whole amount of the note, without any deduction for discount.

One of the most valuable parts of the jurisdiction exercised by this Court, is that by which it inquires into transactions between persons who have been placed in such a situation with regard to others, as that they must have acquired influence over them, and by which it prevents such persons from using that influence for their own advantage and to the detriment of those whom they ought to protect. In this case the Messrs. *Backhouse* had a promissory note brought to them, which was signed by Mr. *Maclean* and indorsed by a young lady whom they knew to have been, shortly before, his ward, and to be still residing with him as part of his family. Nevertheless, they did not make any inquiry, whatever, of the young lady herself, nor did they inquire of the persons who brought the note, whether any consideration had been given for it: but they contented themselves with ascertaining that the young lady was of age and possessed of a large fortune. As they have averred themselves to be utterly ignorant on the subject of consideration, I doubt extremely whether they will be at liberty to prove, at the hearing of the cause, that some consideration was actually given. But, be that as it may, this case is, on the face of it, a case of strong suspicion; and, therefore, I shall continue the injunction.

1848: 16th Jan.

A motion to discharge the order for continuing the

1847.

MAITLAND v. BACKHOUSE.

injunction having been made before the *Lord Chancellor*, his Lordship delivered the following judgment.

In this case, the injunction granted by the *Vice-Chancellor*, was to restrain the bankers, Messrs. *Backhouse*, from proceeding against the Plaintiff upon a promissory note for 5000*l.*, not drawn by the Plaintiff, but by her uncle, who had acted as her guardian and with whom she had resided, and made payable to her; ostensibly, therefore, implying an undertaking, on the part of her uncle and guardian, to pay her 5000*l.* At that time, he was insolvent. How the accounts stood between him and his niece, does not appear; but he was insolvent; and, shortly afterwards, he became bankrupt; and his drafts on *Backhouse's* bank, had been refused payment on account of the state of his credit, and the state of his account with them. Messrs. *Bolkow* and *Vaughan*, ironmasters in the same neighbourhood, kept an account with the same bank; and they too were in difficulties. They had overdrawn their account; and the house had refused to make any further advances on their account. It appears from the answer (to which alone I can now refer), that a cheque drawn by *Bolkow* and *Vaughan*, dated the 9th of March, for 2000*l.* was presented (but on what day the answer does not state) for the purpose of directing payment, by this bank, of 2000*l.* to *Maclean*, the uncle and guardian of this young lady: a strange proposition to make to a banking-house which had already refused to honour the drafts of either the one or the other. The bankers, of course, refused to pay the cheque: whereupon *Bolkow* and *Vaughan*, the parties who drew it, deposited with them the promissory note for 5000*l.*, which, also, was dated on the 9th of March. The bankers did not do anything with the note until the

6th of May; when they discounted it in this way: they carried 5000*l.* to the credit of *Bolkow* and *Vaughan*, and debited them with interest on that sum from the day on which they took the note until it should become payable.

Now, as between the Plaintiff and her uncle, there could be no question; for, though the note purported to be a security for 5000*l.* to be paid by the uncle to the niece, she indorsed it for his accommodation.

Then the bankers say that their case is this:—"We know nothing of all this; we had a promissory note given to us with the name of the Plaintiff upon it; and, though we knew that the uncle was in embarrassed circumstances, we did not require anything further: we knew that the niece was of age, and therefore was competent to bind herself; and that she was also a person competent to pay:" for it appears they were well aware that the property belonging to the niece amounted to between 60,000 and 80,000*l.*: a very important consideration in another part of this case.

Then the question is: Whether, upon this answer, I find, not an admission, (for that seems to be unnecessary,) but whether I find that the facts raise a reasonable suspicion, so as to affect the Defendants with the equities which, beyond all doubt, affect the immediate parties to the transaction?

On the 9th of March, a check for 2000*l.* was drawn, by one insolvent person in favour of another, on a house which had treated both of them as unworthy of credit. On the very same day, one of them, *Maclean*, signed a promissory note, making himself ostensibly liable to pay

1847.

MAITLAND v. BACKHOUSE.

5000*l.* to his niece; and she indorsed it generally. As the check was drawn in *Durham* on the 9th, and was sent to *London* and then back again to *Durham*, it could hardly have been presented before the 11th of March; it certainly was not presented later than the 12th, and then it was, of course, dishonoured. Whereupon *Bolkow* and *Vaughan*, who drew it, deposited the note with the bankers, in order to induce them to pay the check. These circumstances must have excited a strong suspicion in the minds of the bankers, that *Maclean* had placed the note in the hands of *Bolkow* and *Vaughan*, and, consequently, that the Plaintiff, his niece, had indorsed it without consideration and for his accommodation; for, otherwise, he, being the person primarily liable upon it, and solely liable upon it as between him and his niece, was not the proper person to have possession of it. The whole transaction shows an understanding and arrangement, between *Maclean* and *Bolkow* and *Vaughan*, for the purpose of obtaining money either for *Maclean* alone or for themselves and him; and, if the transaction was sufficient to raise a presumption, in the minds of the bankers, that the note came out of the possession of *Maclean* into the hands of *Bolkow* and *Vaughan*, it surely was sufficient to create a suspicion in their minds as to the origin of the transaction, and to induce them to inquire into the history of it; especially as they knew the connexion between the Plaintiff and *Maclean*; that she had not long before emerged from infancy and that he was insolvent. They did not, however, ask *Bolkow* and *Vaughan*, when they tendered the note, whether they had given value for it or how they became possessed of it. And, what is still more extraordinary, they made no inquiry on those subjects, when they were preparing to put in their answer; although it was most important, with a view to their

defence, to show that the note had been negotiated. But the answer does not even suggest that any one else ever had a title to the note, or say a single word about the negotiation of it. We know very well that, if bankers have a customer to whom they are in advance, they will take any security the customer gives them, whatever it may be; if it is good, so much the better; if it is bad, they are none the worse for having it. They state that, when the note was brought to them, they inquired of *Bolkow* what was the age of the Plaintiff and the amount of her property, and that, on the next day, they paid the check; but that they did not discount the note until the 6th of May, because they wanted to satisfy themselves as to the correctness of *Bolkow's* statement. But they do not explain how it happened that they paid the 2000*l.* before they had satisfied themselves that *Bolkow's* statement was correct.

Then the question is: Whether, under these circumstances, I ought to dissolve the injunction and permit these parties to possess themselves of the 5000*l.* Consistently with everything they have said, there may be a case which, in equity, will deprive them of it. They had an opportunity of stating a case, which, if they had stated it, would have entitled them to receive the money. If they could have made out a title to the note in some one else, they would have had a right to rest their defence on it; but, as they do not suggest anything of the kind, I must consider the case as standing nakedly on the facts they state, and, therefore, that they took the note, from *Bolkow* and *Vaughan*, knowing the transaction to be a transaction between them and *Maclean*, showing that both the one and the other were desirous to raise money on the faith of this note, which had been taken, from this young lady, to facilitate that operation. I

1847.

MAITLAND v. BACKHOUSE.

therefore think that there is quite sufficient on the face of this answer, without imputing falsehood to any part of it, to sustain the injunction. Though there may be no falsehood in the answer, there certainly is a most anxious abstinence from any statement of those facts which might have led to an investigation of the truth. One instance of that, is the statement made with regard to the check, which was the foundation of the arguments for these Defendants. It cannot be disputed that, if the check had come directly from *Maclean*, or from *Bolkow* and *Vaughan*, it would have raised a strong suspicion. What do the Defendants say about it? First of all, that it was dated on the 9th of March: they do not say when it came to them, but they say it was presented through the *London* Joint-stock Bank, and therefore we may assume that it was either the property of the Joint-stock Bank or that it belonged to some one who had paid it into the *London* Joint-stock Bank, in order that the Bank might receive the amount for him. They then say that, on the faith of the 5000*l.* note, they paid the check, on the 13th of March, through their *London* agents, to the party holding it. They do not say that they paid it to the *London* Joint-stock Bank; and they do not tell us to whom they paid it: they only say that they paid the 2000*l.* to the person holding the check. This is quite consistent with their having paid it either to *Maclean* or to *Bolkow* and *Vaughan*, and quite consistent with those facts which go a great way to show that they are not in a situation to obtain payment of the 5000*l.* They do not attempt to make a case to meet the case of the Plaintiff. They suppress some facts and plead ignorance as to others.

I think that the *Vice-Chancellor* came to a very right conclusion that this was a case which required a great

deal more investigation, and therefore that it was not right to let the Defendants have the 5000*l.* until that investigation had been made.

It only remains to consider one other point, which is as to the payment of the money into Court. The *Vice-Chancellor* takes no notice of that in his judgment. Whether it was asked I do not know, nor is it very material that I should know. I have to dispose of the case on its own merits, without reference to what passed in the Court below.

There does not appear to be any suggestion, in the answer, of the probability that this money is in danger, or any case made which makes it the duty of the Court to take care that, if the injunction turns out not to be well founded, the parties shall not be injured. There is no suggestion of the kind. It is extremely improbable that there is any danger; for we have an admission, on the face of the answer, that this young lady succeeded to a property of 60,000*l.* or 80,000*l.*; and, unless the guardian has dealt with her money in other instances as he has in this, she is not a person likely to be incapable of paying 5000*l.* if she should ultimately be found liable to pay it. The old practice on the subject, is not very applicable to the present state of this Court. When I was called to the bar, a party who obtained an injunction obtained it for a great many years to come; for the other party had no opportunity of getting his Cause heard for years; and, therefore, something might happen, in the mean time, to put in jeopardy the subject of the contest between them. But it fortunately now happens, owing to the state of the business in this Court, that parties are sure to get their causes heard within a very few weeks after they are ripe for decision; and, there-

1847.

MAITLAND v. BACKHOUSE.

fore, there is not the same necessity for ordering money into Court, as there formerly was. I think that no case is made for that here; and, though I think it is the duty of the Court, generally, to be quite sure that the fund is not ultimately lost by the interposition of an injunction, yet here, there being no case of peril or danger suggested, but, on the contrary, there appearing, on the face of the proceedings, great probability of there being no danger, I think it is not proper, at present, to order the money into Court. If anything should arise to make that proper, the parties have it in their power to apply to the Court whenever it shall become necessary; but, at the present moment, looking at the pleadings and looking at the sort of case which the Plaintiff may have to make out against the Defendants so as to protect herself ultimately against the payment of this money, I do not think it proper to order the money to be paid into Court. I simply affirm the *Vice-Chancellor's* decision; but I think that the costs of this application should be costs in the Cause.

Mr. *Cairns*.—The Plaintiff states, in her bill, that she is residing out of the jurisdiction of the Court, and that the whole of the property to which she was formerly entitled, or nearly the whole of it, has been appropriated, by Mr. *Maclean*, to his own use.

The *Lord Chancellor*.—If there is any case arising out of the state of the Plaintiff's property, it must be made the subject of a special application.

BRIDGES *v.* HINXMAN.*

1847: 3rd Dec.

Heir. Parties Pleading. Administration.

Testator devised all his real estate to his widow. Held, (overruling *Brown* v. *Weatherby, ante*, Vol. XII. p. 6,) that his heir was not a necessary party to a suit to administer his real estates under 3 & 4 Will. IV. c. 104.

THIS was a creditor's suit, seeking to make the real estates of the deceased debtor applicable to the payment of his debts under 3 & 4 Will. IV. c. 104. The Defendant was the widow and executrix of the debtor, and also the sole devisee and legatee under his will.

The *Vice-Chancellor* ruled, after argument, in the course of which *Brown* v. *Weatherby* (*a*) was cited, that the heir of the testator was not a necessary party to the suit.

Mr. *Bethell*, Mr. *James Parker*, Mr. *Elmsley*, and Mr. *Karslake*, were counsel in the cause.

* *Ex relatione.* (*a*) *Ante*, Vol. XII. p. 6.

HODGE *v.* CHURCHWARD.

1847: 11th Dec.

Trust. Will. Construction.

Testator devised freeholds and copyholds to his son for life, and after his decease to his first and other sons, *paying* 10*l.* a-year to M. C. for life. Held that the word "paying" created a charge and not a trust.

JOHN CHURCHWARD, by his will dated the 10th of December 1808, devised certain freehold and copyhold tenements to his son *Matthew* for life, without impeachment of waste: "after his decease to the first, second, third and fourth sons, and so on, lawfully begotten, *paying* to my wife, *Grace Churchward*, his

1847.

HODGE v. CHURCHWARD.

mother, 16*l.* a year of lawful money of *Great Britain*, quarterly, for life; also to my daughter, *Mary Churchward*, 10*l.* a year of lawful money of *Great Britain*, quarterly, for life."

The testator died in February, 1809, and thereupon the son entered into and had continued ever since in possession of the tenements. He paid his mother her annuity of 16*l.* a year until her death; and he paid his sister her annuity of 10*l.* a year for some years after the testator's death; but had not made any payment in respect of it since 1817. The bill was filed in August 1846, by the sister and her husband, claiming to be paid the arrears of her annuity.

Matthew Churchward insisted, by his answer, that the claim was barred by the Stat. of Limitations 3 & 4 Will. IV. chap. 27.

Mr. *Shebbeare*, for the Plaintiff, argued that the word, "paying" made the obligation to pay the annuity a personal *trust;* inasmuch as that word referred to the person who was to make the payment, and not to the property out of which it was to be made; and, consequently, that the Plaintiff's claim was saved by the 25th sect. of the Act: *Ward* v. *Arch* (*a*), *Young* v. *Lord Waterpark* (*b*).

Mr. *Malins* and Mr. *Whitbread*, for the Defendant, said that the word, "paying," made the annuity a rent-charge; and, therefore, the case was within the second and third sections of the Act.

(*a*) *Ante*, Vol. XII. page 472.

(*b*) *Ante*, Vol. XIII. page 204.

1847.

HODGE v. CHURCHWARD.

The VICE-CHANCELLOR:

The word, "paying," creates, not a trust, but a charge or condition; and therefore the Plaintiff's claim is barred by the Statute.

Bill dismissed with costs.

THOMAS v. LEWIS.

1848: 21st January.

New Orders. Practice.

A cause was put at issue according to the old practice, so long ago as Feb. 1816; but no further step was taken in it until Nov. 1847, when the Plaintiff moved to withdraw the replication and file a new one. That motion was refused. In December following the Defendant moved to dismiss for want of prosecution.

THIS Cause was put at issue, according to the old practice, so long ago as February 1816; but no further step was taken in it, until November 1847, when the Plaintiff moved to withdraw the replication and file a new one. That motion was refused. In December following the Defendant moved to dismiss the bill for want of prosecution. That motion also was refused; but the Plaintiff was ordered to set down his cause, for hearing, on the 15th of February 1848, or the bill to be dismissed. In December 1847, the Plaintiff examined witnesses.

A motion was now made, on behalf of the Defendant, that the depositions of those witnesses might be suppressed, on the ground that they had been taken after publication in the cause had passed according to the new orders of May 1845.

The Court refused the motion, and ordered publication to pass on the day before that on which the cause was to be set down.

1848.

THOMAS v. LEWIS.

pressed, because they had been taken *after publication in the cause had passed.*

Mr. *Bethell* and Mr. *Terrell*, in support of the motion, referred to the 111th Order of May 1845, which directs publication to pass, without rule or order, on the expiration of two months after replication filed.

Mr. *Stuart* and Mr. *Renshaw*, for the Plaintiff, said that the replication spoken of in the Orders of May 1845, was not the old replication, but a replication in the form prescribed by those orders; that this cause was *dehors* those orders, and therefore the proceedings in it must be regulated by the old practice; according to which publication could not pass without giving rules to pass it; and, as no such rules had been given, publication had not passed; and, therefore, the ground on which the motion was made, did not exist. They referred to *Lovell* v. *Blew* (*a*), *Spencer* v. *Allen* (*b*), and *Wheatley* v. *Wheatley* (*c*).

Mr. *Bethell*, in reply, said that the Court would not have refused the application made by the Plaintiff in November 1847, unless it had thought it unjust to give him an opportunity to examine witnesses after he had been guilty of such great delay in prosecuting the suit; that the Order of December 1847, assumed that publication had passed; for a cause could not be set down until publication had passed; and that the motion on which that Order was made, ought to have failed altogether, if the Court had been of opinion that the case was governed by the old practice; for, according to that

(*a*) *Ante*, Vol. XIII. page 492. (*b*) 4 Hare, 455.
(*c*) 7 Beav. 577.

practice, a cause at issue could not be dismissed for want of prosecution. He added that, when the Orders of May 1845 came into operation, the old practice was entirely abrogated (*d*).

The VICE-CHANCELLOR:

In November 1847 I refused to allow the Plaintiff to withdraw his replication and file a new one; and, in December of that year, I refused to dismiss the bill for want of prosecution; but I did not entertain, on either of those occasions, the slightest notion that publication had passed in the cause. I refused the first application, because I thought that it ought not to be granted after so great a lapse of time: and I refused the second, and ordered the Plaintiff to set down his cause on a given day, because I considered that the case was not within the new orders, and that it was necessary for me to make a special order. When I made that order I meant to leave both parties at liberty to do what, according to the state of the cause, they were at liberty to do. Therefore, unless something has been done, in this cause, which amounted to the passing of publication, I cannot say that publication has passed. Nothing, however, has taken place which could amount to the passing of publication; and, therefore, the ground on which I am asked to suppress the depositions, does not exist. Consequently I cannot make the order; but I will direct that publication in the cause do pass on the 14th of February next, the day before the cause is ordered to be set down.

(*d*) The Orders of May 1845 took effect, on the 28th of Oct. 1845, as to all suits then depending or thereafter to be commenced. *Beavan's* Ord. 273.

SMITH *v.* THE EAST INDIA COMPANY.

1847: 20th Dec.

1848: 18th, 19th, 22nd Jan., and 8th Feb.

Principal and Agent.

THE Plaintiff was in the service of the East India Company. In March 1832, he sailed, in command of one of the Company's ships called the *London*, on a voyage from *London* to *Madras* and *China*. He arrived at *Madras* on the 5th of July, and reported his arrival to *Henry Chamier*, Esq., the chief secretary to the Governor and Council of that presidency, and was directed, by the Governor and Council, to place himself under the orders of the Marine Board of the Commercial Committee at *Madras*. When the ship was despatched from *England*, it was intended that, on her arriving at *Madras* and discharging her cargo consigned to that presidency, she should, to the extent of three-fifths of her tonnage, be laden with cotton, to be shipped, at *Madras*, on account of the Company, and should proceed with it to *China*.

The Plaintiff having learnt, on his arrival at *Madras*, that the Company had a quantity of cotton in store there, which, owing to the inferiority of its quality, they, probably, would not choose to export to *China* on their own account, wrote a letter to *W. E. Underwood*, the secretary to the Marine Board and Commercial Committee, in which he offered to purchase the cotton at a

The captain of an Indiaman, on arriving at Madras, reported his arrival to the Government board there, and was directed by them to place himself under the orders of the Commercial Committee at that place. After which he made an offer to the Government-board, through the Commercial Committee, to purchase some cotton belonging to the India Company, at a certain price. The Government-board accepted the offer, conditionally, and wrote a letter to that effect to the Commercial Committee. The Plaintiff, on being shown the letter, objected to the condition: in consequence of which the Commercial Committee took upon themselves to dispense with it.

Held that the India Company could not enforce the condition against the Plaintiff.

certain price, payable in *China*. *Underwood*, by order of the Commercial Committee, communicated the Plaintiff's offer to the Governor and Council, in a letter addressed to *Chamier* as their secretary, and stated that the Committee recommended the Governor and Council to accept the offer, and to permit the Plaintiff to occupy so much of the tonnage of the ship as he might require, for the purpose of conveying the cotton to *China*, subject to the payment of such freight as the Court might see fit to determine. *Chamier*, in reply, addressed a letter to the Marine Board and Commercial Committee, notifying the acceptance of the Plaintiff's offer by the Governor and Council, and their approval of his being permitted to occupy such portion of the tonnage of the ship as he might require, subject to the payment of freight.

When the Plaintiff offered to purchase the cotton, he (as he alleged) believed that, unless his ship were laden with it, the greater part of her stowage would remain unoccupied on her voyage to *China*; and he made the offer under the belief and with the understanding that he was not to be charged with any freight for the cotton, if he purchased it. He further alleged that, when *Chamier's* letter was shown to him by *Underwood*, he observed that it would bind him to pay freight for the cotton, and refused to take it upon those terms: that *Underwood* communicated, to the Marine Board and to *Chamier*, what had passed between him and the Plaintiff, and that it was then determined, by the Marine Board and by the Government, that the Plaintiff should be allowed to ship the cotton and carry it to *China* without paying any freight for it; and that, shortly afterwards, *Underwood*, by order of the Marine Board and Commercial Committee, wrote a letter to him to that effect. However, after the cotton had been shipped, a bond was tendered to him, conditioned for

1848.

SMITH v. THE EAST INDIA COMPANY.

payment by him, to the India Company, not only of the price of the cotton, but also of freight for it. The Plaintiff, at first, refused to execute the bond: but, on *Underwood* stating that the clause respecting the freight was a matter of form only and would not be enforced against him, he consented to execute it, on receiving an official letter to that effect. *Underwood*, accordingly, wrote to him the following letter dated the 3rd August 1832:—"*Madras* Marine Board Office, Commercial Committee. Sir, I have the honour, by order of the Commercial Committee, to transmit to you a copy of a bond which you will be required to sign. A clause has been introduced, by order of Government, binding yourself and the officers of your ship to pay such freight, for the portion of the Honourable Company's ship, *London*, which they may occupy in private trade, as the Honourable Company may see fit to determine. You will be allowed the usual privilege tonnage, *and no freight will be charged on the cotton purchased by you from the Government*, as it will be laden in a portion of the Honourable Company's three-fifths, nearly the whole of which is unoccupied. I have, &c.: *W. E. Underwood*, Secretary." On the receipt of this letter, the Plaintiff executed the bond and then proceeded on his voyage to *China*. On arriving in that country he paid the Company the price agreed upon for the cotton. He returned to *England* in 1833, with a cargo of silk, which the Company sold on his account, and afterwards rendered him an account of the transactions between themselves and him, in which they charged him with 693*l.* for the freight of the cotton.

In 1837 the Plaintiff brought an action against the Company for the 693*l.*, and then filed the bill in this cause, praying for a declaration that the Company were

not entitled to claim the freight, and for an injunction to restrain them from setting up the bond in defence to his action.

It appeared, from the evidence in the cause, that the Marine Board at *Madras* had no general authority to enter into commercial contracts on behalf of the Government Board, and that the latter had not authorized any departure from the terms of *Chamier's* letter to the Marine Board.

The Cause now came on to be heard.

Mr. *Bethell* and Mr. *Stevens*, for the Plaintiff, said, first, that, as the Government Board had directed the Plaintiff, on his arriving at Madras and reporting his arrival to them, to place himself under the orders of the Marine Board, they made the Marine Board the channel of communication between themselves and him; and every communication which afterwards took place between them and the Plaintiff, was made through that channel; and, consequently, the Government Board were bound by the acts of the Marine Board. *Neeld* v. *The Duke of Beaufort* (*a*), *Whitehead* v. *Tuckett* (*b*). Secondly, that the India Company had adopted the contract by receiving the price of the cotton, and, therefore, they were not at liberty to repudiate any part of it.

Mr. *Stuart*, Mr. *L. Wigram*, and Mr. *Lloyd*, for the Defendants, said that an agent might bind his principal, even if he exceeded his authority; but the act must be within the line of his usual employment: that that position was well illustrated by Lord *Holt* (*c*), who said:

(*a*) 5 Jurist, 1123. (*b*) 15 East, 400. (*c*) Shower, 95.

1848.

SMITH v. THE EAST INDIA COMPANY.

"If a man send his servant, with ready money, to buy goods, and the servant buy upon credit, the master is not chargeable. But, if the servant usually buy for the master upon tick, and the servant buy some things without the master's order, yet, if the master were trusted by the trader, he is liable:" that *Neeld* v. *The Duke of Beaufort* did not apply; for, there, a third party dealt with an agent on the faith of a written authority; and the Court, of course, held that that authority could not be controlled by verbal instructions: that *Whitehead* v. *Tuckett* was decided on the same principle: that the taking of a bond and giving a letter to defeat the effect of it, was an unprecedented transaction; and that the Plaintiff, who was a very experienced officer in the Company's service, must have known that the Company never allowed their tonnage to be occupied free of freight; and that the only remedy which he had, was an action for damages against *Underwood*, for having misrepresented the extent of his authority: *Smout* v. *Ilbery* (*d*).

Mr. *Bethell*, in reply, cited the following passage from *Smith's* Mercantile Law (*e*):—"As far as the agent's authority extends, he has a right to bind his principal to third persons. Now this authority may, as we have seen, be either expressly given or inferred from the acts of his supposed principal. When it is expressly given, there can be no doubt as to its extent, except from the uncertainty of the words employed in delegating it. When, however, it is to be inferred, from the conduct of the principal, that conduct furnishes the only evidence of its extent as well as of its existence; and, in solving all

(*d*) 10 Mees. & Wels. page 1, see page 9.

(*e*) Page 116 of the 4th edit.

questions on this subject, the general rule is that the extent of the agent's authority is (as between his principal and third parties) to be measured by the extent of his usual employment; for he who accredits another by employing him, must abide by the effects of that credit, and will be bound by contracts made, with innocent third persons, in the seeming course of that employment and on the faith of that credit, whether the employer intended to authorize him or not; since, where one of two innocent persons must suffer by the fraud of a third, he who enabled that third person to commit the fraud, should be the sufferer."

The VICE-CHANCELLOR:

This case depends upon the effect of the letters which were written by Captain *Smith*, and by Mr. *Chamier* and Mr. *Underwood*, the secretaries to the Government Board and the Marine Board; and unless there is an equity arising out of the contents of those letters, it is plain that the legal right of the *East India* Company must prevail. [His Honour read the letters and then continued as follows:] It is observable, with respect to the letters of Mr. *Chamier* and Mr. *Underwood*, that they bear, upon the face of them, the appearance of being written by the secretaries of the respective bodies to which those gentlemen were secretaries, and by the order of those bodies; and they are dated either from the office of the Marine Board, or from *Fort St. George*, where the office of the Government was. Therefore Captain *Smith* might reasonably suppose that they were written by the orders of the Marine Board and Government Board. The letter, which was written by Mr. *Chamier* to Captain *Smith* on the 5th of July, expressly directed him to place himself under the orders of the Commercial Committee of the Marine Board.

1848.

SMITH v. THE EAST INDIA COMPANY.

Then the question arises, whether, when the bond (which Captain *Smith* executed) was transmitted with the letter of the 3rd of August, Captain *Smith* was not fully justified in placing absolute reliance on that letter.

The language in which Mr. Justice *Bayley* gives his opinion in the case of *Whitehead* v. *Tuckett*, is most descriptive of what the law is on the point. He says: "The Defendant must be taken to have given *Sill* and *Co.* a general authority. If, therefore, they have abused the confidence placed in them, the Defendant who intrusted them, and not the Plaintiffs, the innocent purchasers, must suffer for it." In this case the Governor in Council, did, by the letter of the 5th of July written by Mr. *Chamier*, direct Captain *Smith* to put himself under the direction of the Commercial Committee of the Marine Board; and the Marine Board conducted their negotiations with Captain *Smith*, through the medium of their secretary, described as such: and if Captain *Smith* gave credence to any one letter as coming from the Marine Board, he must be taken, in common fairness, to have treated every other communication in like manner. Therefore, when I find there was a bond given, accompanied by that letter which was written by Mr. *Underwood* on the 3rd of August, I must take it for granted that the impression produced on Captain *Smith's* mind, was that he was at liberty to consider himself safe, when he executed it, from its legal operation.

Therefore my opinion is that Captain *Smith* has made out a complete defence, and that he is entitled to the relief which he asks; and, as he has been in the right throughout, the Company must pay the costs of the suit.

CHRIST'S HOSPITAL *v.* GRAINGER.

1847: 17th, 20th, 22nd, and 23rd Nov., and 6th Dec.

1848: 11th Jan.

Charity. Trustee. Municipal Corporations Act.

Under a will dated in 1624, real and personal property was vested in the corporation of *Reading*, upon certain trusts for the poor of that town; and if the corporation neglected to perform those trusts, or misemployed the property for one year, the will gave it over to the corporation of *London*, in trust for *Christ's* Hospital. In 1639 a decree was made on an information, in the Exchequer, against both corporations, which directed the corporation of *Reading* to apply the income of the property for the benefit of the poor of that town, but in a manner different from that prescribed by the will, and that, if the corporation of *Reading* should neglect to perform the premises or should misemploy the property for one year, they should convey it to the corporation of *London* in trust for *Christ's* Hospital. The corporation of *Reading* neglected to perform the directions of the decree, for several years. In 1837, certain individuals were appointed trustees of the property in their place, under the Municipal Corporations Act.

The Court held the decree of 1639 to be binding, and the legal estate in the property, to be still vested in the corporation of *Reading;* and ordered them to convey the property to the corporation of *London*, in trust for the Hospital.

JOHN KENDRICKE, by his will dated in 1624, gave 7500*l.* to the mayor and burgesses of the town of *Reading*, in trust to buy lands of the value of 50*l.* by the year; which sum it was his will and meaning should be paid, by them, to his sister, yearly, during her life, and, after her decease, to the overseers of the poor of *Reading* for the time being, yearly for ever, and should be bestowed and distributed, by the overseers, to and amongst the poor people of *Reading* for ever, in such sums and to such persons as the overseers for the time being should think meet according to the necessity and desert of the same several persons: provided always and his meaning was that his yearly gift should not any way abridge the said poor of the ordinary allowance usually assessed and collected, of the wealthier

1848.

CHRIST'S HOSPITAL v. GRAINGER.

inhabitants of the town, towards the relief of the said poor people, but should be unto them an increase of relief yearly for ever: and, if that his gift and provision should happen to be, by the said mayor and burgesses, or by the overseers for the time being, ordered and disposed of contrary to his meaning thus declared, or if his will and desire above expressed touching the bestowing and distribution of the said sum of 50*l.* yearly, should be omitted, neglected or left unperformed by the space of one whole year after it was, by that his will, appointed to be distributed and bestowed as aforesaid, then his will was that the said sum of 50*l.* a year should be, by the said mayor and burgesses and their successors for the time being for ever, paid to the treasurer of *Christ's* Hospital in *London*, and, by the governors of the same Hospital, employed and bestowed in the relief and education of the poor children of the said Hospital; or else that the said mayor and burgesses for the time being, should, by their sufficient deed in law, convey and make over the lands of the said yearly value of 50*l.* unto the mayor, commonalty and citizens of the city of *London* and their successors for ever, unto the use of the said Hospital, to be employed as aforesaid. Moreover his will and meaning was that, with another competent part of the 7500*l.* the said mayor and burgesses should purchase a house and garden within the town of *Reading* or the liberties thereof, fit and commodious for setting the poor on work therein; which house and garden his will was should be used and occupied by such as the said mayor and burgesses, from time to time for ever, should appoint and ordain for the employing and handling of the stock of money by him thereby left and devised to that purpose: and his will and meaning was that the residue of the 7500*l.* should make and be a common stock, to be employed and bestowed in trade of

1848.

CHRIST'S HOSPITAL v. GRAINGER.

clothing, as also in working of wool, hemp, flax, iron, grinding Brazil-wood and other stuffs for dyeing, or otherwise as, to the mayor and burgesses aforesaid and their successors for ever, should seem convenient for the employment of poor people, and for the preservation and increase of the said common stock: and that the said mayor and burgesses and their successors for ever, should have the election, placing and ordering, and also the displacing (if cause should be) of all and every person and persons to be employed in the handling and husbandry of the said common stock in the house aforesaid, according to their, the said mayor and burgesses, good discretion from time to time for ever; wherein yet his desire was that they should prefer the poor of the said town to the said work and employment, before others of other places: and, for the performance of those premises, his will was that the sum of 7500*l.* before, for that end, by him bequeathed to the said mayor and burgesses, should be paid unto them and their successors, in manner and form following; (that was to say) 2000*l.* at the end of one year next after his decease; other 2000*l.* at the end of two years next after the day of his decease; and the residue of the said whole sum, being 3500*l.*, at the end of three years next ensuing after and from the day of such his decease. But, if it should happen that the said mayor and burgesses or their successors, *should neglect, omit or fail to perform the premises according to his will and meaning above declared, or should misemploy the said stock contrary to the true intent and meaning of that his devise and disposition for the good of the poor and their honest employment and maintenance as aforesaid, and that such their neglect, omission or misemployment should continue, at any time, by the space of one whole year together, then his will and meaning was that his said whole legacy of* 7500*l.*, *and every part and*

1848.

CHRIST'S HOSPITAL v. GRAINGER.

parcel thereof, should be, thence, utterly frustrate void and of none effect as to, for and concerning the said mayor and burgesses and their successors, and as to, for and concerning the uses thereof before limited and expressed; and the said whole common stock should be by them, the said mayor and burgesses and their successors for the time being, forthwith paid unto the mayor commonalty and citizens of the city of London, *to the use of* Christ's *Hospital in* London, according as he had above devised and disposed touching the revenue of 50*l.* a year for ever, first bequeathed to the use and relief of the poor people of the town of *Reading:* as also his will and meaning was that, *in that case of non-performance by the said mayor and burgesses, the house and garden to be purchased in* Reading *as aforesaid, should be, by the said mayor and burgesses and their successors, conveyed and made over, by their deed sufficient in law, unto the said mayor commonalty and citizens of the city of* London *and their successors for ever, to the like use of* Christ's *Hospital in* London *as aforesaid.*

The testator died shortly after the date of his will. His executors paid the legacy of 7500*l.* to the corporation of *Reading;* and they, in compliance with the directions in the will, laid out part of it, in purchasing lands of the value of 50*l.* a year and a house and garden, and in rebuilding part of the house and repairing another part of it, and making it fit for the purpose for which it was intended: and they employed the residue of the legacy in making loans to clothiers of the town. But that mode of dealing with it having been found detrimental to the interests of the charity and of the town, the Lords of the Privy Council, in the year 1634, directed their attention to the subject of the charity, and requested Archbishop *Laud* to take consideration

1848.

CHRIST'S HOSPITAL v. GRAINGER.

thereof. The Archbishop, after advising with the *Attorney* and *Solicitor General* and the Recorder of *London*, made a certificate, to their Lordships, as to the mode in which, the residue of the legacy ought, in his opinion, to be thenceforth applied. The Lords of the Privy Council confirmed the certificate; and, shortly before the year 1639, an information was filed, in the Court of Exchequer, against the corporations of *London* and *Reading*, praying to have the funds of the charity administered according to the certificate. The cause was heard in 1639; and, by the decree then made, it was ordered that the certificate should be, in all points, decreed; and, in pursuance thereof, it was ordered and adjudged, by the Court of Exchequer, that the remainder of the 7500*l.* should be laid out, by the corporation of *Reading*, for the purchasing of land; that the first year's rent and profit of the land, should be paid to them, to be by them kept as a stock to defend the title of the lands in case it should, at any time, be controverted, and to repair the workhouse; and that, for defence of such title and reparations, the corporation of *Reading* should have power to make stay of a year's rent of the same lands as often as need should require; and that, after the first year's rent should be received to the use above-mentioned, they should, yearly, upon good security, lend, out of the profits and issues of the lands, *gratis*, to men of the town, especially to poor beginners and clothiers, in the first place, four score pounds a man for ten years, and so the same to continue for ever until it should appear, by the greatness of the stock, that there were not men enough to employ the same money; in which case, the sum so to be lent as aforesaid, should be increased to 100*l.* and to 200*l.* a man, and no more; and that, after the said stock would bear the loan of 200*l.* a man, then that bank or stock should continue

1848.

CHRIST'S HOSPITAL v. GRAINGER.

still in the town of *Reading*, as the testator intended, and the yearly proceeds, issues and profits of the lands should go and be, for ever, to the binding of poor children apprentices, and the marriage of poor maids, inhabiting the town; and this to be done at the choice and nomination of the corporation of the town for the time being, provided no one received above the sum of 50*l.* for portion or gift with the apprentice, but as much less as the said corporation should think fit: and, as touching the workhouse, it was further decreed that all the implements therein belonging to clothing, should be forthwith sold by the corporation and that the money to be by them received for the same, should be laid out to purchase lands, and that the yearly rents, issues and profits of that land should be, by the said corporation employed for the setting young, poor and fatherless children to work, in some part of that house, upon such handycraft trades as were most fitting for the service of the town of *Reading*, and that the rest of that house should be allowed, rent-free, for the habitation of some honest man that should teach the younger people their handycraft trades and keep them to work; and, when they had learned their trades, then to be bound apprentices; and in case the lands to be purchased with the remainder of the money, should exceed the rent of 160*l.* *per annum*, the surplusage thereof should be converted to the further maintenance of trade in the house: and it was lastly ordered adjudged and decreed that, if it should happen that the corporation of *Reading*, or their successors *should neglect to perform the premises according to the now stating decree, or should misemploy the said stock contrary to the true intent and meaning of the decree, and that such neglect or misemployment should continue, at any time, for the space of one whole year together, then the whole legacy of* 7500*l.*, *should be*

utterly void and of none effect as to the said corporation and their successors, and as to the uses before expressed in the decree, and that the said whole common stock should be, by the said corporation for the time being, forthwith paid unto the corporation of London, *to the use of* Christ's *Hospital, according as was devised by the testator's will; and that, as well the said land as also the said house and garden, in due and lawful manner, should, by the corporation of* Reading *and their successors, be conveyed, by their deed sufficient in the law, to the corporation of* London *and their successors for ever, to the like use of* Christ's *Hospital.*

The corporation of *Reading*, in obedience to the decree, laid out, from time to time, portions of the balance of the 7500*l.*, which remained in their hands at the date of the decree, in the purchase of lands. They invested, from time to time, other portions of that balance, and also sums arisen from the income and accumulations of the charity property, in the £3 per Cents., and thereby purchased, in the whole, 6388*l.* of that stock; and the trustees of the charity property, who had been appointed in the place of the corporation of *Reading*, under the Municipal Corporations Reform Act (5 & 6 Will. IV. c. 76, sect. 71) had, since their appointment, purchased, in like manner, 1611*l.* of the same stock.

The bill in this Cause was filed in November 1842, by the mayor and corporation of *London*, as governors of *Christ's* Hospital, against the trustees of the charity appointed under the Municipal Corporations Reform Act, the town clerk of *Reading*, the corporation of that town, (as having the legal estate in the charity-lands still vested in them,) and the *Attorney-General*. After

1848.

CHRIST'S HOSPITAL v. GRAINGER.

stating as above, it alleged that the corporation of *Reading*, as well as the trustees appointed in their place, had, from time to time during the period of much more than a year together, neglected, omitted and failed to perform, not only the trusts of the will, but also the directions of the decree of the Court of Exchequer; and that they had left the same unperformed, and had misemployed and ordered and disposed of the legacy of 7500*l.* and the property and income arising therefrom, contrary to the testator's meaning declared in his will, and also to the true intent and meaning of the decree; and that they had continued such non-performance and misemployment for much more than the space of a whole year together: that, in May 1841, the Plaintiffs first became acquainted with the matters set forth in the bill subsequent to the decree; and that they were advised that, under the circumstances stated, the limitation over contained in the will, had taken effect, and that they were entitled, under the provisions contained in the will and in the decree, to have the estates and other property and funds purchased with or arisen from the legacy or the income and accumulations thereof, conveyed, assigned and transferred to them, for the benefit of *Christ's* Hospital.

The bill prayed that it might be declared that, under existing circumstances and having regard to the intentions of the testator in his will expressed, the estates, funds and property which had been purchased with or had arisen from the legacy of 7500*l.* and the income and accumulations thereof, ought to be applied to the benefit of *Christ's* Hospital; and that the Plaintiffs, as governors of *Christ's* Hospital, were entitled to the said lands, funds and property, for the benefit of the Hospital; and that the trustees and the corporation of *Reading*

might be decreed to convey, assign and transfer, to them, as governors and for the benefit of the Hospital, all the estates, funds and property which had been purchased with or arisen from the 7500*l.* or the income or accumulations thereof.

The trustees, in their answer, stated that, when the testator made his will, *Reading* was a manufacturing town; but that it had long ceased to be so; and that, in consequence thereof, the corporation did, from time to time, make such alterations in the mode of dealing with and administering the funds of the charity, and, particularly, with respect to the trades and manufactures carried on in the house, as to them seemed most convenient for the employment and setting to work of the poor inhabitants of the town and for the preservation and increase of the common stock; and that, at the time of filing their answer, the manufacture of silk and ribbons was carried on, with great activity, in *Reading* and, particularly, in the house. And they submitted that no default or neglect of, or act or acts done or omitted by the corporation or the trustees, in or about the administration of the trusts of the will, could or ought to affect or prejudice the rights or interests of the poor inhabitants of *Reading*, who were the primary objects of the testator's bounty: and they insisted that the bill was improperly framed, inasmuch as the Plaintiffs claimed to be absolutely entitled to the estates and property of the charity, by reason or on account of some default or neglect of, or act or acts of forfeiture committed by the corporation of *Reading* and the trustees, but had not stated any particular or definite period of time at or within which, or the name or names of any particular person or persons by whom such default or

1848.

CHRIST'S HOSPITAL v. GRAINGER.

act or acts of forfeiture were made or committed: and they relied upon the great length of time which had elapsed since the foundation of the charity and during which the same had been administered in the manner mentioned in their answer, and on the Statutes of Limitation, as a defence to the suit; and they claimed the same benefit, from their answer, as if they had pleaded the several matters aforesaid, to the bill.*

The Cause now came on to be heard.

Mr. *Stuart*, Mr. *James Parker* and Mr. *Freeling*, for the Plaintiffs.

There are two distinct classes of property in this case: one held under the will and not affected by the decree of

* It appeared, from the answer, that, in 1689, an information was filed in the Court of Chancery, at the relation of the *President and Treasurer* of *Christ's* Hospital, against the corporation of *Reading*, to recover the charity property, on the ground of some mismanagement of the property by the corporation. In obedience to an order in that cause, the corporation produced some books, which were inspected, by certain persons, on behalf of the relators. The cause came on to be heard on the 26th of January 1690, when it was ordered to stand in the paper, to be heard on some day of causes after term; but it was not further proceeded with. The answer in the above case, insisted that, at the time of the institution and abandonment of the suit of 1689, the corporation of *London* had notice of the trusts of the will and of the course of management which the corporation of *Reading* had pursued with regard to the charity property, and, as they had not thought proper to prosecute that suit, that they must be taken to have acquiesced in that course of management. However, no proceedings in the suit were produced, from which it appeared that the corporation of *London* were parties to it.

1848.

CHRIST'S HOSPITAL v. GRAINGER.

the Court of Exchequer; and the other held subject to the trusts which were settled and established by that decree. The property of the first class is that which was purchased in pursuance of the direction, in the will, to buy lands of the value of 50*l.* a year; the rents of which were to be paid to the testator's sister, for life, and, after her decease, to the overseers of the poor of *Reading* for the time being, to be by them distributed amongst the poor of that town. The decree leaves that property just as it stood under the will. The property of the second class is that which is held subject to the trusts and directions of the decree. It consists of a house and garden in *Reading* and estates in the neighbourhood, and also of 6388*l.* and 1611*l.* £3 per Cents. The arguments which we shall address to the Court, will be confined to that property; and we submit, with respect to it, that every event pointed out by the decree, on which the title of *Christ's* Hospital was to accrue, has happened. We submit too that the Hospital would have had a right to that property under the will: but, as the decree was made in a suit to which the corporation of *London*, who are the governors of the Hospital, were parties, they are bound by it and must make out their title under it.

The decree directed the corporation of *Reading* to lay out the residue of the legacy of 7500*l.* which remained in their hands, in the purchase of lands, and to apply the rents, after the first year, in making loans, of a certain amount, to men of the town, and especially to poor young beginners and clothiers; and, if there should be any surplus, to apply it in apprenticing poor children and portioning poor maids inhabitants of the town. It appears, however, from the books and accounts of the corporation, that no loan whatever has been made since

1848.

CHRIST'S HOSPITAL v. GRAINGER.

the year 1797, and that, although some loans were made prior to that year, they were made very sparingly.

The learned counsel then stated other instances in which the corporation of *Reading* had either neglected to perform the directions of the decree, or had misemployed the rents of the charity estates contrary to the true intent and meaning of the decree; and, particularly, that, from Michaelmas 1821 down to February 1837 (when the corporation ceased to be trustees of the charity) they had not applied a single shilling of the rents to any of the purposes of the decree; but had invested them in government stock; which investment was, of itself, a departure from the decree; for it directed the surplus of the rents, after making the loans, to be continued, as a bank or stock, in the town of *Reading;* and that the trustees appointed in the place of the corporation, had followed the same course: so that, in decreeing the property to *Christ's* Hospital (which was as much an object of the testator's bounty, as the poor of *Reading* were) the Court would not deprive a single individual, who was a *cestui que trust* under the decree, of the enjoyment of the property. They added that there was no trace of any land having been purchased with the money produced by the sale of the implements in the house which the decree directed to be sold; and that the corporation, instead of employing the house as a place for the poor and fatherless children of *Reading* to work in, had let it out, in workshops, to silk-weavers from *Spitalfields*, (who were employed by manufacturers in *London*): and that the trustees had followed the example of their predecessors in that respect also; therefore, not only for one year but for a series of years, there had been both a neglect to perform the directions of the decree, and a misemployment

1848.

CHRIST'S HOSPITAL v. GRAINGER.

of the charity property contrary to the true intent and meaning of the decree; and, consequently, the direction in the decree in favour of *Christ's* Hospital, had come into operation. But, if the Court should be of opinion that the decree was invalid, then *Christ's* Hospital claimed the property under the limitation over in the will; for the course of dealing with the property which the corporation of *Reading* and the trustees had pursued, was as much a breach and non-performance of the trusts of the will, as it was a non-compliance with the directions of the decree. They concluded by observing that, there being an express trust declared in favour of *Christ's* Hospital, which was to take effect on failure of the prior trusts, there could be no *cypres* application of the property, even if those trusts had become incapable of being performed; and that, the property being still vested in the trustees, the case was not within the Statute of Limitations; for that statute did not bar a trust, unless the property had been conveyed to a purchaser for valuable consideration (*a*).

Mr. *Freeling* cited *The Attorney-General* v. *Pyle*(*b*), *The Attorney-General* v. *The Brewers' Company* (*c*), *Ward* v. *Arch*(*d*), *Wych* v. *The East India Company*(*e*), *Pentland* v. *Stokes*(*f*), *The Attorney-General* v. *The Coopers' Company* (*g*), *The Attorney-General* v. *The Cordwainers' Company* (*h*), *Jack* v. *Burnett* (*i*), and *The*

(*a*) See 3 & 4 Will. IV., c. 27, sect. 25.
(*b*) 1 Atk. 435.
(*c*) 1 Meriv. 495.
(*d*) *Ante*, Vol. XII., page 472.
(*e*) 3 P. W. 309.
(*f*) 2 Ball & Beatt. 68.
(*g*) 3 Beav. 29.
(*h*) 3 Myl. & Keen, 534, see 543.
(*i*) 12 Cl. & Fin. 812.

1848.

CHRIST'S HOSPITAL v. GRAINGER.

Commissioners of Charitable Donations and Bequests v. *Wybrants* (*k*).

Mr. *Bethell*, Mr. *Bacon* and Mr. *Selwyn*, for the trustees appointed in the place of the corporation of *Reading*.

The gift over, in the will, to *Christ's* Hospital, is void: for, where there is a gift to a trustee in fee in trust for a *cestui que trust* in fee, a court of equity regards the *cestui que trust* as the real owner of the trust property; and, therefore, any attempt to defeat his interest on the trustee failing to do his duty, is utterly repugnant and void. Co. Litt. 206 *b*. The gift over is also too remote; for it is not a condition, but a conditional limitation, and, therefore, it ought to have been made to take effect within the time allowed by law for the creation of substituted estates. Another objection to that gift, is that it tends to deprive the Court of the jurisdiction, which is now well established but was not so when the will was made, to direct a *cypres* application of the charity property.

The direction, in the decree, for a conveyance to *Christ's* Hospital, is liable to the same objections as the direction in the will. In addition to which it is most flagrantly at variance with the principle of the decree itself; and is wholly unauthorized by the will; for, the gift over was to take effect in the event of the charity property not being administered in the manner prescribed by the will; but the direction for a conveyance to *Christ's* Hospital is annexed to a mode of adminis-

(*k*) 2 Jones & Latouche, 182.

tration which wholly superseded and subverted that prescribed by the will. For these reasons we now call upon the Court to treat the decree as utterly invalid so far as the direction for a conveyance to *Christ's* Hospital is concerned, and to direct the funds of the charity to be applied for the benefit of the poor of *Reading* (who, if not the sole, were the primary objects of the testator's bounty) according to the altered state of the town. *The Attorney-General* v. *Bowyer* (*l*), *Moggridge* v. *Thackwell* (*m*), *Mills* v. *Farmer* (*n*), *Hamilton* v. *Houghton* (*o*), *In re Upton Warren* (*p*), *The Attorney-General* v. *The Cordwainers' Company* (*q*), *The Attorney-General* v. *The Merchant Venturers' Society* (*r*).

Next, we contend that the Court cannot give effect to the claim made by the Plaintiffs, without infringing, not only the rule of law against perpetuities, but the Statute of Limitations also (*s*). This is not a case in which a *cestui que trust* claims against his trustee; but a case in which one charity claims adversely to another. If the claim on behalf of *Christ's* Hospital prevails, the antecedent trusts come to an end; because it is only upon the annihilation of those trusts, that the Hospital is to take. Neither the will nor the decree provides that, on the corporation of *Reading* failing, for one year, to perform the trusts for the poor of *Reading*, they shall hold the property in trust for *Christ's* Hospital: but both those instruments direct that, if the corporation shall neglect, for one year, to perform those trusts, they shall *transfer*

(*l*) 3 Ves. 714.
(*m*) 7 Ves. 36.
(*n*) 19 Ves. 483.
(*o*) 2 Bligh, 169; see 193.
(*p*) 1 Myl. & Keen, 410.
(*q*) 3 Myl. & Keen, 534.
(*r*) 5 Beav. 338.
(*s*) See 3 & 4 Will. IV. c. 27, sect. 40.

1848.

CHRIST'S HOSPITAL v. GRAINGER.

and convey the property to the corporation of *London*, to the use of *Christ's* Hospital: therefore the antecedent trusts were to come to an end, and the trust-property was to pass from one set of trustees to another, and to be held, by the latter, upon totally different trusts, and for a totally different object. So that the gift to the corporation of *London* is a new gift, which is to take effect, by way of executory devise, in defeazance of the fee simple vested in the corporation of *Reading*. And, therefore, it must take effect within the time prescribed by the rule of law against perpetuities. But the corporation of *London* do not claim the benefit of that executory devise until more than two hundred years after the death of the testator and more than forty years after their title (according to their own showing) accrued: and we submit that it is impossible to take away property from one owner and to transfer it to another, after so great a lapse of time. If the corporation of *Reading* were still to be the trustees and administrators of the property, and *Christ's* Hospital were, in a given event, to become their *cestui que trust*, neither the rule of law nor the Statute of Limitations would apply. But it is not so. On the happening of the event the trusts for the poor of *Reading* are to cease, and the property is to be transferred from the corporation of *Reading* to the corporation of *London*, in trust for *Christ's* Hospital. So that there is a competition between two alleged legal owners: the corporation of *London*, on the one hand, and the corporation of *Reading*, on the other: and, that being the case, the rule of law and the Statute do apply: for whoever claims by a legal title, must claim in conformity to the rules and statutes which regulate legal titles. *Beckford* v. *Wade* (*t*).

(*t*) 17 Ves. 97.

1848.

CHRIST'S HOSPITAL v. GRAINGER.

If however the claim made by the bill, might have been supported against the corporation of *Reading*, it cannot be supported against the new trustees, for whom we appear.—They have a statutory right to the office of trustee: their title is a parliamentary title: they do not claim under the corporation of *Reading*, but under an appointment made, by the *Lord Chancellor*, in pursuance of the power vested in him by the Municipal Corporations Reform Act: consequently they cannot be affected by any act or default of the corporation. The corporation were their predecessors in office, but nothing more. They were not invested with their office by the corporation, but by a paramount and independent authority. That body, so far as its trusteeship is concerned, is annihilated; and, according to the maxim: "*Actio personalis moritur cum personâ*," every action or suit which their misconduct might have given rise to, has perished with them. *Bignold* v. *Springfield* (*u*).

Mr. *Bacon* said that the gift over in the will, was introduced *in terrorem*, or as a penalty on the trustees in case they neglected their duty; and that many cases had been brought before the Court in which similar gifts occurred, but there was no instance in which effect had been given to them: that the Court of Exchequer might have been justified in altering the application of the charity-funds; but it had no power to direct that the property should go away from the poor of *Reading*, if the corporation neglected to perform the directions of the decree. He cited *The Pewterers' Company* v.

(*u*) 7 Cl. & Fin. 71; see *Norton*, 11 Mees. & Wels. page 117; see also *Doe* v. 913.

1848.

CHRIST'S HOSPITAL v. GRAINGER.

Christ's Hospital (*x*) in order to show that the gift over was obnoxious to the rule of law against perpetuities.

The VICE-CHANCELLOR:

That case differs very materially from the present. In this case there is a gift in trust for one charity, and, on the happening of a certain contingency, a gift in trust for another charity. There is no more perpetuity created by giving property to two charities, in that form, than by giving it to one. The evil meant to be guarded against by the rule of law against perpetuities, is the making of property inalienable.

Mr. *Bacon*, then contended that the claim of the Plaintiffs, was barred by the 40th sect. of the Statute of Limitations (3 & 4 Will. IV. c. 27). Upon which his Honour observed that he had read that section, and that his opinion was that the claim could not be brought within it, without straining the words.

Mr. *Selwyn* referred to *The Attorney-General* v. *The Mayor of Newbury* (*y*), a case which, like the present, arose on the will of *John Kendricke*.

Mr. *Rolt* and Mr. *Follett* appeared for the corporation of *Reading*; and

Mr. *Twiss* and Mr. *Blunt* for the *Attorney-General*.

Mr. *Stuart* replied.

(*x*) 1 Vern. 161.
(*y*) 3 Myl. & Keen, 647; see 652.

1848.

CHRIST'S HOSPITAL v. GRAINGER.

The VICE-CHANCELLOR:

I will read over the pleadings and evidence in this case, before I finally dispose of it: but I will now make one observation, and that is that the decree of the Court of Exchequer, might, for aught I know, have been wrong; but the question is whether, as it was made by a Court of competent jurisdiction, and was not appealed from, it does not bind the case. If that be so, the only question is whether the facts of the case do not bring it within the letter of the decree.

1848.
11th January.

The VICE-CHANCELLOR:

I have read through the papers in this case: and I conceive that I am bound by the decree made by the Court of Exchequer in the year 1639.

It is perfectly plain that those things have not been done which were prescribed by the decree. The necessary consequence is that the 7500*l.* (by which I understand the decree to mean every thing that had been bought, or thereafter might be bought with any portion of that sum, as well as any residue of it uninvested,) has gone over to the corporation of *London* as the Governors of *Christ's* Hospital.

It is perfectly manifest, from the contents of the different books that have been produced by the Defendants, that there has not been that application of the revenue arising from the 7500*l.*, which was prescribed by the decree. The very fact that there exists that sum of 6388*l.* Consols, is a proof of the Plaintiff's case; because that has wholly arisen from the

1848.

CHRIST'S HOSPITAL v. GRAINGER.

investment, in the purchase of Consols, of that money which, according to the decree, ought to have been applied in a very different manner: and therefore it is a matter of course to direct that the estates and property shall be conveyed to the Plaintiffs, as governors of *Christ's* Hospital; and they must pay the costs of the corporation of *Reading*, who are merely trustees in the sense of having the legal estate remaining in them.

I wish to make one observation with respect to the 71st sect. of the Municipal Corporations Act. It is plain, on the face of that section, that what the legislature meant, was that the estates which were vested in corporations as trustees, should become vested in those persons who were thereafter to be appointed trustees by the *Lord Chancellor;* and the simplest words might have been used for the purpose of declaring that the persons so to be appointed should be a corporation, and should take the trust property as such: just in the same way as, by some of the Acts of Parliament, churchwardens are made corporations, and take property in their corporate character. But it is very remarkable that the 71st sect. is so worded that the law is bound to declare, and has declared that that estate which the section says shall cease, does not cease but continues. (*z*)

Declare that, it appearing that the directions of the decree of the Court of Exchequer in the pleadings mentioned have been neglected and not performed according to the decree; and that the stock in the decree mentioned has been misemployed contrary to the true intent and meaning of the decree, and that such neglect and

(*z*) See *Doe* v. *Norton*, and *Bignold* v. *Springfield*, *ubi supra*.

misemployment have continued for the space of one whole year together and upwards, the Plaintiffs, as governors of *Christ's* Hospital, have become and are entitled to the whole of the common stock in the decree mentioned and the lands purchased pursuant thereto, and the house and garden therein mentioned; and that the same respectively ought to be paid and conveyed to the Plaintiffs, to the use of *Christ's* Hospital. Refer it, to the *Taxing-Master* in rotation, to tax the costs of the Defendants, the corporation of *Reading* and of *John Jackson Blandy* their town clerk, as between solicitor and client; and direct such costs to be paid, by the Plaintiffs; order the Defendants, the corporation of *Reading*, upon payment of their costs, to convey and assure the house and garden and the hereditaments purchased in pursuance of the decree, to the Plaintiffs, as governors of *Christ's* Hospital, to the use of the hospital, to be by them employed and bestowed in the relief and education of the poor children of the hospital; such conveyance to be settled by the *Master*; and all proper parties are to join in such conveyance as the *Master* shall direct: and it appearing that the sums of 6388*l.* and 1611*l.* £3 per Cent. Consolidated Bank Annuities in the pleadings mentioned to be standing in the names of the Defendants, the trustees appointed in the place of the corporation of *Reading*, have been purchased with or have arisen from the rents, income and annual produce of the charity estates and property before directed to be conveyed and the accumulations thereof, order the said Defendants, the trustees, to transfer, into the name and with the privity of the *Accountant-General* in trust in this cause, the 6388*l.* and 1611*l.* £3 per Cent. Annuities subject to the further order of this Court. Refer it to the *Taxing-Master* to tax the costs of the *Attorney-General* and the trustees, as between

1848.

CHRIST'S HOSPITAL v. GRAINGER.

solicitor and client. Order so much of the said Bank Annuities as will be sufficient to raise the amount of such costs, to be sold, and the money to arise by such sale to be applied in payment of such costs. Order the residue of the 7999*l.* Bank Annuities to be transferred to the Plaintiffs as governors of *Christ's* Hospital, or as they shall direct.*

* An appeal is pending before the Lord Chancellor.

1848: 14th Jan.

Power to appoint trustees. Construction.

A power to appoint a new trustee, on an existing one *becoming incapable* to act, does not apply to the case of a trustee going to reside abroad.

WITHINGTON *v.* WITHINGTON.

IN this case the *Vice-Chancellor* held that a power, in a will, to appoint new trustees in case the trustees thereby appointed should become *incapable of acting* in the trusts, did not authorize the donee of the power to appoint a new trustee in the place of one who had gone to reside in *China.*

Mr. *Bethell*, Mr. *Milne* and Mr. *C. Hall* were the counsel in the cause.

Fowler v. Fowler 33 Beav. 617
Fish - Att. Gen. 4 L. Rep. Eq. 524

MITFORD *v.* REYNOLDS.

1848: 16th, 17th, and 24th Feb.

Will. Construction.

THE will of *Robert Mitford*, Esq., the testator in the Cause, was dated the 21st of July 1835, and commenced thus:—

"The will late made by me, was destroyed in consequence of circumstances that occurred in my family, which have totally changed the nature of the relations as they had previously subsisted; and, by a necessary result, my disposition towards the parties, in respect of their succession to the property, real and personal, of which I may be found to be possessed at the period of my decease, after the payment and discharge shall have been made of all my just debts and necessary expenses, funeral charges, &c. &c. I, therefore, will and devise that this memorandum, conveying the full expression of my wishes in my own handwriting, being, at this moment, through the mercy of God, as I ever have been, in the full possession of my mental faculties and reason, shall be holden and be regarded, to every intent and purpose, as my last, my true and only will and testament, and, as such, that the executors and the administrators hereunto appointed, do act and conform, not only to the very letter of the instructions herein contained, but do adhere to and execute them in the

Testator, in the eighth clause of his will, directed his executors to purchase a piece of ground, which he described, and to erect a monument upon it for the interment of his own body and the bodies of his parents and sister, and to pay the expence out of the surplus of his property, after discharging his debts and legacies. By the ninth clause, he gave *the remainder* of his property to a charity. The owner of the piece of land refused to sell it.

Held that the subject-matter of the ninth clause, was not so implicated with the subject-matter of the eighth, as that, the eighth having failed, the ninth must fail also; and that the eighth having failed, the whole surplus of the testator's property passed by the ninth clause.

1848.

MITFORD v. REYNOLDS.

same manner, and give them the same full force and effect as were this my will drawn up, prepared and executed in a legal and formal way. Premising, to render the expression of my wishes more clear and the injunctions more fully absolute, that, should any person or persons herein named (I allude especially to my wife, *Elizabeth Anne Mitford*, my brother, the Rev. *John Mitford*, and his son, *Robert Henry Mitford*,) to whom any bequest may or may not be made, save and except in the just and fair prosecution for the recovery, attainment and eventual receipt of the amount of any bequest herein made that may be withheld, on any plea, but which cannot be my intention, in regard to the amount of bequests made to other individuals, improperly question, dispute, offer objection or opposition to any of the provisions of this my will, or prefer any claim to the whole, part or portion of my property, such person or persons, *primâ facie*, shall be holden, in such case, (that is, provided such claim question or dispute be extended into an overt act of hostility by the institution of a suit at law or other wilful and offensive measure), to have forfeited all right, title and claim to all and every part or portion of such property that may or may not have been so bequeathed to them or may be so claimed; and such amount of property shall, in consequence, be assigned and appropriated to the purposes hereafter declared and set forth. The principle that governs such my directions and such exclusion and forfeiture, being, in the first respect, that the property has been acquired by me, in a long and arduous course of service in *India;* and, therefore, is, exclusively, mine own; and, in the next respect, that I have regulated the disposition and appropriation of it in the following manner, in a spirit accordant with my own views and feelings towards the parties above-named; *against which, it is my will and*

1848.

MITFORD v. REYNOLDS.

desire that, even the law itself, shall not interfere nor prevail."

The will, after giving several legacies, proceeded thus:

"Eighthly, in the event of my demise at an early period, I direct and enjoin the executors and administrators hereunto, to purchase and prepare, for the ultimate deposit of my body, and also for the removal and deposit of the remains of my parents and my sister now lying interred in a vault in the churchyard of *Chipping Ongar* in *Essex*, the mount that is contiguous, surrounded by a moat, which, I understand to be the property, at present, of Mr. *Evans*; on the summit of which they will be pleased to cause the erection (construction) of a suitable and handsome, as well as durable monument, planting the summit and sides of the mount with cedar and cypress trees, in a manner that may render it ornamental to the town; the expenses whereof for the purchase, the construction of the monument, &c. &c., are to be met and provided *from the surplus property that will and may be found after the payment and discharge shall have been made of the above legacies and bequests, &c.* And, though aware that the monument-mount may not be consecrated, I yet direct and expressly will and command that this injunction for the place of final interment, be absolutely attended to and carried into instant effect and completion.

"Ninthly, I will, devise, give, and bequeath *the remainder of my property*, of whatsoever kind and description and that may arise from the sale of my effects, after deducting the annual amount that will be requisite to defray the keep of my horses (which I will and direct be preserved as pensioners, and are never, under any plea

1848.

MITFORD v. REYNOLDS.

or pretence, to be used, rode or driven, or applied to labour) to the government of *Bengal*, for the express purpose of that government applying the amount to charitable, beneficial and public works at and in the city of *Dacca* in *Bengal;* the intent of such bequest and direction being that the amount shall be applied exclusively to the benefit of the native inhabitants, in the manner they and the government may regard to be most conducive to that end."

The testator died in April, 1836.

The bill was filed, by the testator's widow, against his executors and next of kin, and the *East India* Company and the *Attorney-General.* It prayed, amongst other things, for a declaration that the bequest contained in the ninth clause of the will, was void; and that the directions contained in the eighth clause, respecting the mount, were illegal.

The cause was heard, by the *Vice-Chancellor*, on the 8th of June 1838; when his Honour declared that the bequest in the ninth clause was a good and valid bequest for the charitable purposes therein mentioned, and directed enquiries to be made as to the testator's next of kin, and the usual accounts to be taken of his personal estate &c., if the *Master* should find that all his next of kin and the personal representatives of such of them as might be dead, were parties to the suit.

The Plaintiff appealed against the declaration in the decree. The appeal came on to be heard before Lord *Cottenham*, C.; but his Lordship refused to decide the question raised by it, until the enquiries directed by the decree should have been made, and the existence of a

1848.

MITFORD v. REYNOLDS.

residue ascertained by taking the accounts. His Lordship, however, directed the *Master* to enquire what the testator meant by: "the government of *Bengal*." In obedience to that order, the *Master* made a separate report: and, in consequence of what he found thereby, Lord *Auckland*, the then Governor-General of *India*, was made a defendant to the suit. Afterwards, the *Master* made his general report, finding that all the next of kin were parties to the suit, and that there was a considerable residue.

The appeal was then heard by Lord *Lyndhurst*, C., who affirmed the decree (*a*): and, on the cause being brought before his Lordship for further directions, he reserved the question as to the validity of the directions, in the eighth clause of the will, as to the purchase of the mount and the erection of a monument upon it; but directed the *Master* to enquire and state what sum would be reasonably required for the purpose of carrying those directions into effect (*b*). The *Master* reported that 1269*l.* 8*s.* would be reasonably required for that purpose. The widow excepted to the report. Lord *Lyndhurst*, after hearing the exceptions argued, but without either allowing or overruling them, ordered the *Master*, in proceeding with that part of the order on further directions which directed him to enquire what sum would be reasonably required for the purpose of carrying the directions in the eighth clause of the will into effect, to enquire and state on what terms (if any) the owner of the mount would sell it (*c*); and that the now stating order should be without prejudice to any question in the cause, and that the further directions should stand over in the mean time. The *Master* reported *that the*

(*a*) 1 Phill. 185. (*b*) 1 Phill. 199.
(*c*) *Ibid.* 708, 709.

1848.

MITFORD v. REYNOLDS.

owner would not sell the mount on any terms, for the purposes mentioned in the will.

The Cause was now brought before the *Vice-Chancellor* to be heard for further directions on the two last-mentioned reports.

Mr. *Bethell* and Mr. *Heathfield*, for the Plaintiff, the testator's widow.

Hitherto the Court has decided nothing in the Cause, except that, taking the ninth clause in the will abstractedly—that is, assuming that the owner of the mount would sell it and that there would be a residue for the ninth clause to operate upon,—the gift in that clause for the benefit of the inhabitants of *Dacca*, was good as a charitable gift. The Court is now called upon to determine whether, under the circumstances of the case, there is any property upon which that clause can operate.

The testator, after disposing, in the first seven clauses of his will, of a considerable portion of his property in the shape of legacies, subjects the whole of the surplus to the operation of the eighth clause. By the ninth clause, he disposes of the remainder of that surplus, (if there should be any) after fulfilling the directions in the eighth clause. That being so, and the purposes of the disposition made by the eighth clause having utterly failed, there is no subject-matter which can be made applicable to the purposes of the ninth clause: the Court cannot say what residue, or whether any residue is applicable to those purposes.

The VICE-CHANCELLOR:

You mean that, as the purposes of the eighth clause

cannot be carried into effect, there is nothing to determine the amount of the gift in the ninth clause.]

Yes: and we submit that, as the testator has dedicated the whole surplus of his property, after his debts and legacies have been paid, to the purposes of the eighth clause, and as the Court cannot say that any thing short of the whole would be required for those purposes, the necessary consequence is that the whole belongs to his widow and next of kin. *Chapman* v. *Brown* (*d*), *The Attorney-General* v. *Davies* (*e*), and *The Attorney-General* v. *Hinxman* (*f*). When this Cause was before Lord *Lyndhurst*, his Lordship assumed that there would be no difficulty in purchasing the mount, and the orders made by him were made on that ground.

Mr. *Rolt* and Mr. *Stevens*, for the testator's next of kin, said that the amount of the gift intended to be made by the ninth clause, was undefined by the will, and, as it now appeared that the owner of the mount would not sell it, the amount was undefinable: and that that fact was not ascertained when the Cause was before Lord *Lyndhurst*.

They relied on *The Attorney-General* v. *Hinxman*.

Mr. *Stuart*, Mr. *L. Wigram* and Mr. *Lloyd*, for the *East India* Company and Lord *Auckland*.

The proper construction and legal effect of the eighth clause in the will, is that the executors are to set apart, out of the residue of the testator's estate, so much money as may be reasonably required to buy the mount and

(*d*) 6 Ves. 404. (*e*) 9 Ves. 535.
(*f*) 2 Jac. & Walk. 270.

1848.

MITFORD v. REYNOLDS.

erect a monument upon it. Therefore, the difficulty, which existed in *Chapman* v. *Brown*, does not exist in the present case: for, as Lord *Lyndhurst* observed, the purposes of the eighth clause are mentioned with great particularity, and therefore the sum required for those purposes, may be easily ascertained. Lord *Lyndhurst's* decree is a conclusive and binding decision that the construction of the eighth clause which we contend for, is the true construction. The *Master* has reported, in pursuance of that decree, that 1269*l.* 8*s.* would be reasonably required for the purposes in question; and his report, as well as the decree, remain undisturbed. The argument of the counsel on the other side, can be of no avail so long as the decree remains unreversed. They contend that the purposes of the eighth clause cannot be carried into effect; that the gift in the ninth clause is not a good charitable bequest, but is void and of no effect, and that the testator's widow and next of kin are entitled to the whole surplus of his estate after payment of his debts and legacies. But your Honour cannot make a declaration to that effect, so long as Lord *Lyndhurst's* decree remains in force; for it would be in direct conflict with that decree.

When Lord *Lyndhurst* directed the *Master*, in proceeding with that part of the order on further directions which directed him to inquire what sum would be reasonably required for the purpose of carrying the directions in the eighth clause of the will into effect, to inquire and state on what terms (if any) the owner of the mount would sell it, his Lordship did not mean to depart, in the slightest degree, from his decree at the hearing of the Cause: his reason for giving that direction was that, though a land-surveyor might be of opinion that the mount was not worth more than 100*l.* for instance, it by

1848.

MITFORD v. REYNOLDS.

no means followed that, if the owner asked 110*l.*, it would be unreasonable to give it. Therefore that direction was consistent with the decree and with the order on further directions also. Besides, his Lordship, in order further to guard himself in directing the additional inquiry, specially provided that the order should not prejudice any question in the Cause.

We will now make a few observations upon the cases cited for the Plaintiff, in order to show that they do not apply to the present case. In *Chapman* v. *Brown* and *The Attorney-General* v. *Hinxman*, the amount due to the first bequest, could not be ascertained, and, consequently, the surplus could not be ascertained. But, in the present case, the amount required for the purposes of the eighth clause, not only can be, but has been ascertained, and, therefore, the amount of the surplus can be ascertained. The Master of the Rolls says, in *Chapman* v. *Brown*: "If it could be reduced to any certainty, how much would have been employed, by the executors, for the other purposes, the residue ought to be employed under this last direction, *viz.*, for charitable purposes generally."

The *Vice-Chancellor*.—How can it be made out, with certainty, what sum would have been employed in purchasing the mount?

Argument continued.—Suppose that the full value of the mount were 1500*l.*, and that the owner asked 15,000*l.* for it: could any one say that the meaning of the eighth clause was that the executors were to pay that sum? That was not the construction which Lord *Lyndhurst* put upon the clause: he considered that the true construction was, not that the executors were to comply with any

1848.

MITFORD v. REYNOLDS.

demand, however exorbitant, that the owner might think proper to make; but that they were to pay a reasonable price: and we submit that your Honour is bound by that construction.

There is another distinction between this case and *Chapman* v. *Brown* and *The Attorney-General* v. *Hinxman*, namely, that, in those cases, the uncertainty as to the amount due to the prior bequest, appeared on the face of the will. Here, the uncertainty (if any) does not appear on the face of the will, but has arisen from matter *dehors* the will, namely, the refusal of the owner to sell the mount. If the owner had said that he would take for it what it was reasonably worth, it was admitted that the bequest to the *Dacca* charity would have been good: but it was said that, as the owner had refused to sell it on any terms, the bequest was void. So that, according to the argument for the Plaintiff, the validity of that bequest is to depend upon the will of a stranger.

The *Vice-Chancellor*.—Is not this the true effect of Lord *Lyndhurst's* decision: that the bequest to the *Dacca* charity, was a good bequest, provided there was a fund applicable to it; but, if it was impossible to say how much was applicable to it, that the bequest must fail?

Argument continued.—We entertain not the slightest doubt that Lord *Lyndhurst's* meaning was that the residue, after deducting what might be reasonably required to buy the mount, (not what the owner might think proper to ask for it) was well given to the *Dacca* charity; and we submit that this branch of the Court, is bound by his Lordship's decision.

Mr. *Wray*, for the *Attorney-General*, said that the

direction in the eighth clause of the will, was illegal and offensive to public decency, and was also void under the Statute of Mortmain; for one of the purposes for which the mount was directed to be purchased, was that it might be made ornamental to a town; which was a public purpose: and, consequently, that the money which would have been required for those purposes, passed, under the ninth clause, to the *Dacca* charity.

1848.

MITFORD v. REYNOLDS.

Mr. *Craig* and Mr. *Shee* appeared for the executors of the testator; and

Mr. *Lowndes* and Mr. *Leach* for another party.

Mr. *Bethell* replied.

The *Vice-Chancellor*.—Before I decide this case I shall look at the *Master's* reports, and read over the whole of the will.

The VICE-CHANCELLOR:

24th Feb.

In this case, I thought it right, before I decided what seems to be the last point in the Cause, to read over the will and all the other papers in the Cause, in order that I might see what had been done in it. Mr. *Phillips*, in his report of the case upon the first question, mentions that, when an appeal was presented, to Lord *Cottenham*, against the decree which I originally made in 1838, his Lordship did not think fit to express any opinion upon the point which I had decided (*a*); and, as I understand,

(*a*) 1 Phill. 187 and 188.

1848.

MITFORD v. REYNOLDS.

made no order except that, in addition to the inquiries directed by my decree of 1838, he directed one special inquiry, upon a point which was not raised when the Cause was before me, and which seems to have been answered by the separate report of the *Master*. The *Master*, in pursuance of my decree, made a general report as to debts, legacies, &c., but did not notice his separate report. The appeal, came before Lord *Lyndhurst* in 1842; and his Lordship declared that the bequest contained in the ninth clause of the will, was a good charitable bequest. That is the whole of his Lordship's declaration with respect to that bequest: therefore, it must be taken to be a good bequest under all circumstances. With respect to the eighth clause, his Lordship, on the Cause coming on to be heard before him for further directions, ordered the *Master* to inquire and state what sum would be reasonably required for the purpose of carrying into effect the direction of the testator which was given in that clause. His Lordship then states, at length, the words of the eighth clause, and then goes on to say: "But such inquiry is to be without prejudice to any question as to the validity of the last-mentioned bequest." It is quite plain, therefore, that his Lordship did mean that any declaration that might be made with respect to the eighth clause, should depend upon other circumstances than those which appear on the face of the bequest itself.

Then the *Master* made a report (certainly of a very singular kind) to which exceptions were taken. Lord *Lyndhurst* thought it right neither to allow nor to disallow those exceptions; but directed the *Master*, not to review his report, but to inquire and state on what terms, if any, the owner of the land called the Mount,

would sell it (*b*). In obedience to that order, the *Master* has made a report which is, in substance, that Sir *John Swinburn*, the owner of the mount, will not sell it: and the consequence is that the eighth clause wholly fails.

That being the case, I was very much pressed, by the Counsel for the next-of-kin, to hold that the ninth clause also fails. I do not, however, think that I am at liberty to say so. For Lord *Lyndhurst* seems to me to have concluded the question; inasmuch as, when he made the order with respect to the eighth clause, he expressly declared that it should be without prejudice to any question as to the validity of the bequest contained therein: but, when he made the order as to the ninth clause, he finally, absolutely and without any qualification, declared that the bequest contained in that clause, was a good charitable bequest; and it cannot be a good charitable bequest without being a good bequest. That bequest then being good, and the bequest contained in the eighth clause totally failing, that portion of the personal estate which might have been required to answer the purposes of the eighth clause, necessarily falls into that which is the subject of the ninth clause. The same language, you will observe, is not used there, as is used in the eighth clause: but the remainder of his property, is the expression used. The language of the eighth clause, (which seems to have been, in some measure, the subject of criticism upon the discussion before Lord *Lyndhurst*) after giving the direction to purchase the mount, was this: "the expenses whereof for the purchase, the construction of the monument, &c., are to be met and provided from the surplus of property that will and may be found after the payment and discharge shall have been

(*b*) 1 Phill. 709.

1848.

MITFORD v. REYNOLDS.

made of the above legacies and bequests, &c.: and, though aware that the monument-mount may not be consecrated, I direct and expressly will and command that this injunction of the place for final interment, be absolutely attended to and carried into instant effect and completion." These are the special words which are used in the eighth clause; and the fair inference from them is that the testator did not mean that, in order that there might be this unconsecrated re-burial of those who were dear to him and an unconsecrated burial of himself, those legacies should be disappointed; and, therefore, he says that the expenses are to be provided from the surplus property that will and may be found after the payment and discharge shall have been made of the above legacies, bequests, &c. But, when you come to the ninth clause, it is a simple bequest: "I will, devise, give, and bequeath the remainder of my property, of whatsoever kind and description and that may arise from the sale of my effects, after deducting the annual amount that will be requisite to defray the keep of my horses." Therefore, it appears to me that the matter is concluded. And, as I find it now established, by the *Master's* report, that the bequest in the eighth clause has totally failed, because the mount cannot be purchased, it follows, as a legitimate consequence from the decree of Lord *Lyndhurst*, that the order to be made must be one which, after making provision for the horses and for the payment of such legacies (if any) as remain to be paid and directing the costs to be paid, will order the residue to be paid over to Lord *Auckland*, who, as I understand, it is conventionally agreed, for the purpose of this suit, shall represent the government in *India*.

Now that is my opinion in consequence of what Lord

Lyndhurst has decided. But, if he had not so decided, I should have been of the same opinion. For I have considered, very attentively, those three cases of *Chapman* v. *Brown*, *The Attorney-General* v. *Davies*, and *The Attorney-General* v. *Hinxman*, and the conclusion which I have arrived at, is that they do not affect the present case: because, in this case, there is no such implication of the subject-matter of the ninth bequest with the subject-matter of the eighth, as to make it a necessary consequence that, if the eighth fails, the ninth fails. Suppose that a testator were to say that, after payment of his funeral and testamentary expenses, debts and legacies, the residue of his property should go to *A. B.*: and then suppose that the testator were to be drowned at sea; in which case there could be no funeral expenses. Would anybody in Westminster Hall say that, because there was no interment, and, therefore, there could be no funeral expenses, the gift of the residue could not take effect? It seems to me that, in effect, *The Attorney-General* v. *Hinxman*, as far as it goes, is an authority in favour of the opinion which I have formed, if authority were wanting, which I deny; because I consider the point to be concluded by the general law of the land. In *The Attorney-General* v. *Hinxman*, it was held, as a matter of course, that, because the particular charity failed, what would have been appropriated to it, fell into the residue: that is, not for the benefit of the next-of-kin, for they were not parties to the suit, but for the benefit of a person of the name of *King*, who was the legatee of the residue.

I admit, with respect to the case of *Chapman* v. *Brown*, that the *Master of the Rolls* did hold that the ultimate disposition of the residue was so implicated with that which preceded it, that the one could not be separated from the other. But I have read the eighth

1848.

MITFORD v. REYNOLDS.

clause in the will now before me, most attentively, and I cannot see that there is anything whatever which affects the validity of the bequest in the ninth clause, owing to the circumstance that the bequest in the eighth clause, has wholly failed, not on account of any matter of law, but on account of a matter of fact. I use that particular expression because I thought it right, before I decided the case, to read over this fantastical will; and I observe that the testator says that his will shall take effect whatever the law may be. That may be foolish enough; but you cannot assume anything so grossly absurd as that he meant that the bequest should take effect, if, in point of fact, it could not. And, as it has failed in point of fact, my opinion is that the case must be considered as if it had not been made at all; and that therefore the decree must be as I have stated.

However, my opinion is that Lord *Lyndhurst's* decree has concluded the point; and it is not for me, sitting in this inferior jurisdiction, to entertain the question whether the bequest is good or bad.

Declare that, it appearing, by the *Master's* report, that the mount cannot be purchased, the bequest in the eighth clause totally fails, and that the clear residue of the testator's estate, after payment of his funeral expenses, debts and legacies and the costs of the suit, ought to be paid to the Governor-General of *India*, for the charitable purposes expressed in the ninth clause. The order then directed the costs of all parties to be taxed, and made provision for the maintenance of the testator's horses; and, on the death of them or either of them, the Governor-General was to be at liberty to apply to the Court as he might be advised.

Reg. Lib. B. 1847, fol. 1044.

IN RE FORSHAW.

1847:
20th Dec.

Solicitor and Client. Lien.

After *A.* had employed Messrs. *B.* and *C.* as his solicitors, they took *D.* into partnership with them, and *A.* employed the new firm. In the course of that employment, papers belonging to him came into their possession.

Held that *B.* and *C.* had no lien on the papers for costs which *A.* owed them, before they took *D.* into partnership.

AFTER one *Cole* had employed Messrs. *Forshaw* and *Blundell* as his solicitors, those gentlemen took in another partner, whose name also was *Forshaw;* and *Cole* employed the new firm. In the course of that employment, papers belonging to him came into their possession. *Forshaw* and *Blundell* claimed a lien, on those papers, for the amount of a bill due to them, from *Cole*, for business done before they took in their new partner.

The *Vice-Chancellor* held that the claim could not be supported; because the papers came into the possession, not of *Forshaw* and *Blundell*, but of *Forshaw, Blundell* and *Forshaw.*

Mr. *Bethell*, Mr. *Adams*, Mr. *Bacon* and Mr. *Dickinson*, were the counsel in the case.

1848:
31st Jan.
and
8th Feb.

Defendant.
Supplemental answer.

Leave given, to a Defendant, to file a supplemental answer, notwithstanding the information which he wished to avail himself of, had been obtained through a violation of professional confidence.

RAINCOCK *v.* YOUNG.

IN July 1841, the Defendant purchased a house and piece of land of the Plaintiff, the title to which deponded upon the Plaintiff's wife being the only child and heir-at-law of *Ann Hopley*, widow. In 1843 one *Peter Hopley* recovered the premises from the Defendant by an ejectment brought by him as heir to *Ann Hopley*. The Defendant, thereupon, brought an action, against the Plaintiff, on the covenants for title and quiet enjoyment contained in the conveyance of the premises to him. The bill was filed to restrain that action.

After the Defendant had answered the bill and his answer had been replied to, he moved for leave to file a supplemental answer, for the purpose of stating and putting in issue the fact (which had come to his knowledge since his answer was filed) that, before and at the time of the sale, the Plaintiff and his wife had good reason to believe and did believe that they or either of them had not a good title to the premises, and that the wife was not the legitimate child or heir-at-law of *Ann Hopley*

It appeared, from the affidavit in support of the motion, that the Plaintiff's solicitor had shown the Defendant the copy of a letter which he had written to the Plaintiff, and a letter which he had received from the Plaintiff, and that the Defendant thereby, became aware of the facts which he wished to state in the supplemental answer.

1848.

RAINCOCK v. YOUNG.

Mr. *Stuart* and Mr. *Haldane* supported the motion.

Mr. *Bethell* and Mr. *Boyle* opposed it on three grounds: first, because the object of the motion was to enable the Defendant, not to rectify an error or mis-statement in his original answer, (which, they said, was the only purpose for which the Court would allow a supplemental answer to be filed,) but to make a new, substantial, and independent defence, which was not even hinted at in the original answer, and was wholly inconsistent with and would entirely supersede the defence made by it: secondly, because the information which the Defendant wished to avail himself of, had been obtained through a violation of professional confidence, which the Court would have restrained if it had been applied to in proper time, and ought not now to allow the Defendant to take advantage of: and, thirdly, because no new fact could be put in issue after replication, except by a cross bill (*a*).

The VICE-CHANCELLOR:

I think that the order ought to be made.

The story is this. [His Honour, after stating the facts of the case and observing upon some of the statements in the bill proceeded thus:]

I think that the Plaintiff, when he agreed to sell the house and piece of land to the Defendant, did believe that his wife was illegitimate; and I think too that the

(*a*) See, however, *Jackson* v. *Parish*, *ante*, Vol. I. page 505; and *Fulton* v. *Gilmore*, 1 Phill. 522; and *Berkley* v. *Ryder*, 2 Vez. 533.

1848.

RAINCOCK v. YOUNG.

manner in which that fact came to the knowledge of the Defendant, forms no objection to the granting of the motion. The Defendant, however, must pay the costs of the motion and must file his supplemental answer within a fortnight: and, unless the Plaintiff wishes to amend his bill, the replication must stand as a replication to the supplemental as well as the original answer.

1848: 28th and 29th of Feb.

FLINT *v.* WARREN.

Conversion. Heir and next-of-kin.

MARY BRADDON, the testatrix in the Cause, by an instrument intituled as instructions for her will, but which, together with a schedule to it, was proved as her will, expressed herself as follows:

Testatrix, by her will, after expressing an intention to dispose of all her real and personal estate as thereinafter mentioned, gave certain legacies, and appointed *A.* and *B.* her executors, and gave, to them and their heirs, all lawful powers and authorities to conduct and manage her freehold estates, so as that the same might, at their discretion, be sold and converted into money, and she directed that the net money should *form part of her ~~real and~~ personal estate;* and, for those and every other purpose connected with her property whether real or personal, she invested *A.* and *B.* and the survivor of them and his heirs, executors and administrators, with her full authority; and she directed that any undisposed of surplus of monies should be paid as she should, by any future writing or will, direct. She did not however, make any future writing or will. After her death, *A.* and *B.* sold her real estates. Her personal estate was sufficient to pay her debts and legacies.

Held that her heir, and not her next-of-kin, was entitled to the monies produced by the sale.

" As to my real and personal estate and effects whatsoever which it hath or may please God to bestow upon me, I dispose thereof as hereinafter mentioned, that is

Taylor v Taylor 3 D. M. & G. 197.

1848.

FLINT v. WARREN.

to say: I hereby declare my will and mind to be that, in the event of my dying intestate as to all or any of my messuages, lands, tenements, hereditaments and real estate or any part of any of them, that the same shall not, by descent, go to my now heiress-at-law, *Mary Decaufour* spinster,* now of the age of eighty-seven years, but that the persons or person next in succession shall be thereto entitled, in like manner as if the said *Mary Decaufour* had died in my lifetime; but I hope no such intestacy will arise; and, in the mean time, I leave and give the directions in these my instructions hereinafter contained: also I give and bequeath the several annuities and legacies mentioned in the schedule marked *A.* in the margin of this sheet of paper, and to the several persons and charitable institutions therein named and particularized: and I also give and bequeath, unto and for the use and benefit of the several in-brothers and in-sisters for the time being actually and *bonâ fide* resident in the several hospitals of or in the vicinity of the city of *Canterbury* whose present yearly income, to each such in-brother and in-sister, does not exceed the sum of twenty-five pounds, an augmentation or yearly increase of the sum of five pounds to each and every in-brother and in-sister for ever: and I direct my executors to pay or invest, unto or in the names of the governors, masters, trustees or acting patrons of the said several hospitals, a sum of lawful money equal to meet such yearly augmentation; and the non-resident in-brothers and in-sisters, during such non-residence, shall forfeit

* Reports of prior proceedings in this suit will be found, *ante*, Vol. XIV. page 554, and Vol. XV. page 626. All the testatrix's real estates, were of gavelkind tenure. *Mary Decaufour* was her sole next-of-kin, but was not either her heir-at-law or her heir or one of her co-heirs according to the custom of gavelkind.

1848.

FLINT v. WARREN.

their, his or her proportion of such augmentation, and such forfeitures and forfeiture shall, from time to time, be paid over to the then resident in-brothers and in-sisters, in equal shares: and I direct that the several trustees of the said charities, do insert the account, in a proper book, of these my intentions for the benefit of their several foundations, so that the knowledge of the same may be perpetuated: and, as in schedule *A.*, I nominate *Rest Flint*, of *Canterbury* brewer, and *James Warren*, of *Canterbury* silversmith, to be my executors: and I hereby give and devise, to them and their heirs, *all lawful powers and authorities to conduct and manage my freehold messuages, lands, tenements and hereditaments in the event of my not otherwise giving and devising the same in any other manner or to any other persons or person, so as that the same and every part thereof, may, at their or his discretion, be sold and converted into money, and the net money to form part of my personal estate;* and, for those and every other purpose connected with my property whether real or personal, I do invest them and the survivor of them and his heirs, executors and administrators, with my full authority: and, to prevent litigation and strife, any undisposed surplus of monies shall be paid, and with every proper indemnification given by testators to executors and trustees, as I shall, by any future writing or will, direct, as it is my present intention so to do; and, in the mean time, this present writing shall be and contain my last will and testament."

The schedule contained gifts of annuities, and of sums of stock and money to individuals, and of sums of money to charities not mentioned in the will itself.

The testatrix's real estates were of gavelkind tenure.

1848.

FLINT v. WARREN.

Mary Decaufour was her sole next-of-kin, but not her heir-at-law or gavelkind-heir. Her personal estate was more than sufficient to pay her funeral and testamentary expenses, debts, annuities and legacies.

On the Cause being brought on, a third time, for further directions, the question was whether the testatrix's gavelkind-heir or her next-of-kin were entitled to the monies arisen from the sale of her real estates.

Mr. *Cooper* and Mr. *Lewis*, for the gavelkind-heir, said, first, that the testatrix, at the commencement of her will, contemplated that her real estates would descend as such; which was inconsistent with their being converted, out and out, into personalty: secondly, that she had not devised those estates, to *Flint* and *Warren*, in trust to sell; but had given those gentlemen power *to conduct and manage* her estates, and a *discretionary* power to sell them.

They referred to *Collins* v. *Wakeman* (*a*) and to *Hooper* v. *Goodwin*, in which latter case, they said the decision in *Collins* v. *Wakeman* (*b*), was mentioned with approbation.

The VICE-CHANCELLOR:

The testatrix meant by the words: "at their or his discretion," not that *Flint* and *Warren* should have a discretion as to whether they should sell the estates or not, but as to the time and mode of selling them.

Mr. *Bethell*, and Mr. *Chandless*, for the testatrix's next-of-kin.

(*a*) 2 Ves. Jun. 683. (*b*) 18 Ves. 156.

1848.

FLINT v. WARREN.

In *Collins* v. *Wakeman*, the testator's real estates were held to be converted, out and out, into personalty; and the only question was as to a sum of 1000*l.*, which the testator had directed to be set apart out of the proceeds, in order that he might dispose of it thereafter.

The VICE-CHANCELLOR:

In that case, there was a conversion with an intention to dispose of part of the proceeds; but that intention was never carried into effect.

Argument continued.—As the testator gave the 1000*l.*, to his executor, to be disposed of according to any instructions he might leave in writing, he could not have intended to include it in the residuary gift which immediately followed; and, as he did not leave any instructions respecting that sum, Lord *Rosslyn* held that his heir-at-law was entitled to it. That case, therefore, is plainly distinguishable from the present.

This is one of the strongest cases in favour of conversion out and out, that ever has been brought before the Court: for the testatrix has directed her real estates to be sold and the net proceeds to form part of her personal estate, not for any particular or limited purpose, but for *all* purposes. Therefore, she might have disposed of the proceeds by an unattested codicil; and, as she has not disposed of them, we submit that her next-of-kin are as clearly entitled to them as they are to her residuary personal estate. *Green* v. *Jackson* (*a*), *Phillips* v. *Phillips* (*b*).

(*a*) 5 Russ. 35; and, on appeal, 2 Russ. & Myl. 238.

(*b*) 1 Myl. & Keen, 649; see 659.

1848.

FLINT v. WARREN.

The VICE-CHANCELLOR:

When this case was before me in 1845 (*a*) it was contended that the testatrix's real estates were converted, into personalty, *for the purpose of paying her debts and legacies;* and, as it did not then appear that they would not be required to be sold for payment of her debts and legacies, I held that they were converted into personalty for that purpose. It now appears that the personal estate, (which was the primary fund for paying the debts and legacies,) is more than sufficient to pay them; therefore there is no purpose to be answered by the conversion. And, that being so and there being no gift of the proceeds, there is no person who could have called for the conversion if it had not taken place: for, in my opinion, the words: "and the net money to form part of my personal estate," would not have given the next-of-kin a right to call upon this Court to direct the real estates to be sold for their benefit.

The case then stands thus: the testatrix has directed her real estates to be sold, and the net proceeds to form part of her personal estate; but she has not made any gift of that part. As then it is not given away, there is nothing to take it from the heir; and the consequence is that I am bound to say that the heir is entitled to it.

I have perused Lord *Brougham's* judgment in *Amphlett* v. *Parke* (*b*), and was particularly struck with it. That case was very much considered; and though the residuary legatees were, as the report states, dissatisfied with the decision and presented a petition of appeal to the House of Lords, they did not prosecute it.

(*a*) See *ante*, Vol. XIV. p. 554. (*b*) 2 Russ. & Myl. 221.

1848: 10th and 11th March.

Bond. Cancellation. Settlement. Construction.

MITFORD *v.* REYNOLDS.
EX PARTE ELIZA HENRIETTA PATTLE.
EX PARTE THE INDIA COMPANY AND THE EARL OF AUCKLAND.

A PETITION presented in this Cause by Miss *E. H. Pattle*, stated that her father died in 1803; and that she lived with her grandfather and grandmother until she was eighteen, when they sent her to *Bengal*, to the care of the testator in the Cause and the Plaintiff, his wife, who was her aunt. The testator and his wife had no family; and, after the petitioner had resided a short time with them, *they adopted her, and the testator treated her as his child* and held out to her that he would provide for her. She continued to reside with them until April 1835, when they separated, and she went to reside with the Plaintiff. The testator and his

In contemplation of a marriage between a lady, who was an orphan and a Protestant, and a gentleman, who was a Roman Catholic, a settlement was executed, to which the lady's uncle was a party, and the subjects of which were stock belonging to the lady, and two sums of money, one secured by the uncle's, and the other, by the gentleman's bond, and both of them payable to the trustees of the settlement twelve months after the date of the bonds. The settlement, after declaring trusts in favour of the lady and gentleman and their children, provided that, until the marriage should be duly had and solemnized according to the forms of the Church of *England*, or in case it should not be so solemnized within twelve months next after the date of the settlement, the trustees should stand possessed of *all the trust monies, securities and premises and the securities for the same, in trust for the lady*, her executors &c., and should pay, assign and transfer the same accordingly. The marriage never took place. After the uncle's death, his bond was found amongst his papers, with the words: "Cancelled, the marriage never having taken place," written by him across the face of it.

The Court, though it did not consider the bond to be invalidated, held that, according to the true construction of the proviso, the lady was not entitled as the *cestui que trust* of the bond.

Childers v Childers 1 Deg. & Jones 486.

1848.

MITFORD v. REYNOLDS.

wife resided in India until 1828. In May 1824 a marriage was agreed upon, with the approbation of the testator and his wife, between the petitioner and *Henry Joseph Huddleston*, Esq., an officer in the *India* Company's army and a Roman Catholic. On that occasion the testator carried into effect his intention and promise of making a permanent provision for the petitioner; and, with that view executed a bond, dated the 31st of October 1824, to the petitioner's uncles, *James Pattle* and *William Pattle*, both of whom were resident in *India*, and to *John Boodle*, who was resident in *London*, for securing payment, by him, of 20,000 sicca rupees on the 31st of October 1825, with interest. By a settlement of even date with the bond, and made between the petitioner, *Huddleston*, the testator and *James* and *William Pattle* and *Boodle*, and executed by the three first-named parties, after reciting the intended marriage and the bond: It was declared that *James* and *William Pattle* and *Boodle* should stand possessed (amongst other monies) of the money to be received under the bond, in trust to invest the same in government or real securities and to pay the dividends, &c. to the petitioner, for her separate use, and, after her decease, to *Huddleston*, and, after the decease of the survivor of them, to the children of their marriage, and, if there should be none, in trust, to assign the trust funds to the petitioner, her executors, &c. And the settlement provided that, until the marriage should be solemnized according to the form of the Protestant Church of *England, or in case the same should not be so duly solemnized within twelve calendar months next after the date of the settlement, the trustees should stand possessed of the trust-funds in trust for the petitioner, her executors, &c., absolutely*, without any further trust, end, intent or purpose whatsoever, and should assign and transfer the same

1848.

MITFORD v. REYNOLDS.

accordingly. The bond and settlement were prepared under the testator's directions, and by his solicitor at *Calcutta*. The marriage was to have been solemnized on the 31st of October 1824; but it never took place, in consequence of *Huddleston* declining to celebrate it on the ground that the petitioner was a Protestant.

The petition further stated that the testator caused the bond and settlement to be delivered, to the petitioner, as the provision which he had made for her: but, some time after *Huddleston* had finally refused to celebrate the marriage, and some months after the bond and settlement had been delivered to the petitioner, the testator expressed his intention to take some legal opinion as to the petitioner's rights against *Huddleston, and requested her to let him have the bond and settlement for that purpose; and, accordingly, she delivered them to him, and afterwards entrusted him with the custody thereof, in the confidence and belief that they would be (as the testator assured her) as safe in his custody as in her own*: that, on the separation taking place between the testator and his wife, the petitioner, (who, until then had resided with them and had been treated, by the testator, as his child,) went, with his full approbation and consent, to reside with his wife, and continued to reside with her until October 1842: that, in consequence of the bond and settlement, or any copy thereof, not being in the petitioner's possession, and of her not accurately knowing the contents thereof, and of her being inexperienced and unacquainted with business, she was not aware of the necessity of taking, and, in fact, was unable to take any steps for the purpose of enforcing her claims against the testator's estate; and she did not discover that the bond and settlement were in existence until December 1843 when one of the testator's executors

produced them to her solicitor, as having been found by him amongst the testator's papers: that, not having had an opportunity to prove her debt or claim, before the *Master* had made his report under the decree in this Cause, (which was dated the 8th of June 1838,) she, in April 1844, obtained an order giving her liberty to go in before the *Master* and prove her debt against the testator's estate: that she carried in her claim for that purpose, and, on the 23rd of April 1846, the *Master* made his report, and thereby found that *the following words* (*which the petitioner's solicitor had admitted to be in the testator's handwriting*) *were written across the bond, that is to say:* "*Cancelled, the marriage not having taken place.* R. Mitford, Dacca, *April 25th*, 1825:" and, upon consideration of the claim and of the evidence referred to in the report (which consisted, in part, of an affidavit made by the petitioner) the *Master* found that there was not any thing then due, to the petitioner, from the estate of the testator.

The petition prayed for a declaration that the 20,000 sicca rupees secured by the bond, together with interest from the date of it, were due, to the petitioner, from the estate of the testator; and that it might be referred back to the *Master* to review his report, or that the petitioner might be at liberty to except to it.

A cross petition was presented by the *India* Company and Lord *Auckland*. It stated that the bond was executed, by the testator, *as and by way of a marriage portion* for Miss *Pattle:* that a settlement of even date with it was made between *Huddleston*, Miss *Pattle*, the testator, *James Pattle*, *William Pattle* and *Boodle*, reciting that a marriage was intended to be shortly had and solemnized between *Huddleston* and Miss

1848.

MITFORD v. REYNOLDS.

Pattle, and that Miss *Pattle* was entitled to certain stock in the funds in *England* called the £3 10*s.* per Cent. Annuities and £4 10*s.* per Cent. Annuities, as specified in the indorsement made upon the settlement, and that she was also entitled to a certain annuity or *Rente Viagere* of 1200 *livres*, payable, by the government of *France*, during the life of the testator's wife, which was greatly in arrear; and that there was also a considerable arrear of dividends due under the said stocks or funds in *England*, and it was uncertain whether the same were or were not laid out in the purchase of additional stocks or funds for the benefit of Miss *Pattle*; and that, *in prospect of the said intended marriage, the said* Robert Mitford (*the testator*) *had agreed to execute and accordingly had executed the bond* thereinafter more particularly mentioned for securing to *James Pattle*, *William Pattle* and *John Boodle*, the sum of sicca rupees, 20,000, and interest; and that *H. J. Huddleston* had also, *in prospect of the intended marriage*, agreed to execute a bond to *James Pattle*, *William Pattle* and *John Boodle* for securing the sum of sicca rupees, 10,000, and interest, as thereinafter more particularly mentioned; and that the said *Henry Joseph Huddleston* and *Eliza Henrietta Pattle* and *Robert Mitford were desirous of settling* the said stock in the funds in *England*, the *Rente Viagere*, and arrears of dividends, or the stocks purchased therewith, in case any should have been so purchased, *and the sums secured by the said bonds respectively, together with the interest to accrue thereon, for the benefit of themselves and the issue of the said intended marriage* according to the trusts and subject to the powers, provisoes, declarations and agreements thereinafter expressed; and reciting the testator's bond and that *Henry Joseph Huddleston* had also, by his bond under his hand and seal bearing even date with the

1848.

MITFORD v. REYNOLDS.

settlement, become bound to *James Pattle*, *William Pattle* and *John Boodle*, in the penal sum of sicca rupees, 20,000, with a condition thereunder written for making void the same if the said *Henry Joseph Huddleston*, his heirs, executors or administrators should pay or cause to be paid, to the said *James Pattle*, *William Pattle* and *John Boodle*, or the survivors or survivor of them or the executors or administrators of such survivor or their or his assigns, the sum of sicca rupees, 10,000, together with interest for the same at the rate of sicca rupees, six *per centum per annum*, on the 31st day of October 1825; and that it was proposed and agreed and declared, by and between the parties to the settlement, that the several stocks or funds of or belonging to the said *Eliza Henrietta Pattle* together with the *Rente Viagere* and all other stocks or funds which might have been purchased by and with the produce of the said stocks or funds, should, as soon as circumstances would permit, be transferred and assigned to and into the names of *James Pattle*, *William Pattle* and *John Boodle*, and that the dividends and interest which might have been received and accumulated in the hands of the several persons in whose names the said several parcels of stocks then stood, should, in case the same might not have been laid out, pay over the same, to the said trustees, for answering the purposes of the settlement: It was witnessed that, *in order to carry the desire and intention* of the said *Henry Joseph Huddleston* and *Eliza Henrietta Pattle* his intended wife, and *of the said Robert Mitford* into effect, and for declaring the several trusts, ends, intents and purposes, powers, provisoes and agreements on and subject to which the trustees and the survivors and survivor of them, and the executors or administrators of such survivor, or their or his assigns, should stand and be possessed and interested in,

1848.

MITFORD v. REYNOLDS.

as well as the said stocks or funds and *Rente Viagere*, and all dividends, interest and monies which should have arisen therefrom, as also the sums to be received under and by virtue of the said two several bonds and the interest thereof, and of the securities for the same respectively, the said *Henry Joseph Huddleston* and *Eliza Henrietta Pattle*, his intended wife, *and, with respect to the said sum of* sicca rupees, 20,000, *so secured by the bond of the said* Robert Mitford *and the interest thereof, by and with the consent and full approbation of the said* Robert Mitford testified, &c. did declare, direct and appoint that the trustees and the survivors &c. should stand possessed and interested of and in the same stocks, funds, *Rente Viagere*, dividends, interest and principal monies, and all and every sum and sums to be received thereby or thereunder, and the interest, dividends and proceeds thereof, upon the trusts and to and for the ends, intents and purposes and subject to the several powers, provisoes, declarations and agreements thereinafter expressed and declared of and concerning the same: and *Henry Joseph Huddleston* and *Eliza Henrietta Pattle*, his intended wife, thereby directed the said stocks, funds, *Rente Viagere*, dividends, monies and securities to be transferred and made over accordingly: and the trustees covenanted, agreed and declared with and to *Henry Joseph Huddleston* and *Eliza Henrietta Pattle*, his intended wife, and his and her executors, administrators and assigns respectively, that the trustees, and the survivors &c. when and so soon as the stocks or funds in *England*, *Rente Viagere* and other stock which should or might have been so purchased by and with the said dividends,* should be transferred into their names and the dividends and proceed thereof and therefrom, and also of and in† all sum and sums of money which should or might be received by them or the survivors, &c. as the accumulation

* *Sic.*

† *Sic.*

1848.

MITFORD v. REYNOLDS.

of the dividends of the said funds, and under or by virtue of the two several bonds thereinbefore recited, any or either of them, or by any the means thereinbefore mentioned,* stand possessed and interested of and in the same severally and respectively and the securities for the same, in trust, *as soon as and if the circumstances of the case would allow and admit of, to call in and compel payment of the same respectively, and, as occasion and such circumstances* might admit, forthwith to lay out or invest the monies to arise therefrom and thereby respectively, in the names or name of the trustees or of the survivors, &c. in or upon real or Government securities either in the United Kingdom *of Great Britain* and *Ireland*, or the funds or securities of the *East India* Company either in *England* or *India*, or on mortgage or real securities in *India*, so as that, during the lifetime of the said *Henry Joseph Huddleston* and *Eliza Henrietta Pattle*, his intended wife, or the survivor of them, the same should be so laid out or invested by and with the privity and consent of them or the survivor of them; and upon further trust that the trustees and the survivors &c., should pay and deliver the interest, dividends proceed and produce of the said trust premises, when and as the same should, from time to time arise and accrue and be received, into the proper hands of the said *Eliza Henrietta Pattle*, the intended wife of the said *Henry Joseph Huddleston*, or into the hands of such person or persons as she, notwithstanding she might be then married, should, by any note or writing under her hand for that purpose, from time to time when the same should have accrued, but not previously, direct or appoint to receive the same, for her own sole and proper use and benefit* during the term of her natural life, but, in no instance, by anticipation or on account of any mortgage, pledge or incumbrance to be made on the said interest, dividends

* *Sic.*

* *Sic.*

1848.

MITFORD v. REYNOLDS.

or annual proceed or produce or any part thereof, nor in anywise to be subject to the debts, control or engagements of her said intended or any future husband; and, from and after her decease, in case the said *Henry Joseph Huddleston* should survive her, in trust that the trustees and the survivors &c., should pay the interest, dividends, proceed and produce of the said trust premises, when and as the same should from time to time arise and accrue and be received, unto the said *Henry Joseph Huddleston* and his assigns for and during the term of his natural life, or, at his request, authorize and empower him or them to receive or take the same for his and their own use and benefit; and, from and immediately after the decease of the survivor of them the said *Henry Joseph Huddleston* and *Eliza Henrietta Pattle* his intended wife, then upon trust that the trustees and the survivors &c. should stand possessed and interested of and in the said capital trust premises, and the interest, dividends, proceed and produce thereof (accumulating the same if circumstances would admit and allow) and the securities and funds for the same respectively, in trust for the children of the marriage as therein mentioned.* And it was thereby declared that, in case there should be no child of the said marriage who should acquire a vested interest under the trusts thereinbefore contained, the trustees should stand possessed of and interested in the trust premises and all dividends, interest and annual proceed and produce thenceforth to become due and payable in respect of the same, and all accumulations

* The settlement contained a proviso, (which was not set forth in the petition) enabling the trustees, after the deaths of Mr. *Huddleston* and Miss *Pattle*, to apply the income of the children's presumptive shares of the trust-funds, for their maintenance and education according to the Protestant religion of the Established Church of *England*.

thereof, upon trust to pay and transfer the same in the manner following, that is to say, as to the sum of sicca rupees, 10,000, which should or might have been received by the trustees under and by virtue of the bond of the said *Henry Joseph Huddleston* thereinbefore recited, and the accumulated interest which should or might have accrued therefrom for want of application thereof for the purposes aforesaid and the securities for the same, in *trust to pay, assign and transfer the same unto the said* Henry Joseph Huddleston *absolutely, in case he should be then living, and, in case he should be then dead, then to his executors or administrators, absolutely,* without any condition or restriction whatsoever; and, *as to all and singular other the said trust monies and premises* and all accumulations thereof and therefrom and the securities for the same, in trust to pay, assign and transfer the same unto the said *Eliza Henrietta Pattle,* the intended wife of the said *Henry Joseph Huddleston,* absolutely, in case she should be then living, and, in case she should be then dead, then to her executors or administrators absolutely, without any condition whatsoever; and, that, in respect thereof, any will or codicil, or instrument made and executed by her in the nature of a will or codicil at any time during her coverture, (which, the said *Henry Joseph Huddleston* thereby consented to her making) should be effectual and pass the same, nevertheless, subject to the exercise of the power of appointment thereinbefore contained.

Provided always and it was thereby agreed and declared, by and between the parties thereto, that, until the said intended marriage should be duly had and solemnized according to the forms of the Protestant Church of *England,* or in case the same should not be so duly solemnized within the space of twelve calendar

1848.

MITFORD v. REYNOLDS.

months next after the date of the settlement, then and in such case the trustees and the survivors &c. *should stand possessed of and interested in all and singular the said trust monies, securities and premises and the securities for the same, in trust for the said* Eliza Henrietta Pattle, *her executors administrators and assigns absolutely, without any further trust, end, intent or purpose whatsoever, and should pay assign and transfer the same accordingly, anything in the settlement contained to the contrary thereof in anywise notwithstanding.*

The petition then stated that the intended marriage was never solemnized either according to the rites of the Protestant Church or according to the rites of the Roman Catholic Church: that the bond of the testator was in his possession at the time of his death, and, upon the production thereof, it appeared that it was cancelled, and that, across the face of it the words following were written in the handwriting of the testator: "Cancelled, the marriage not having taken place. *R. Mitford, Dacca*, April 25th 1825:" that, on the inquiry before the *Master* relative to Miss *Pattle's* claim, evidence on both sides was entered into, but the *Master* admitted, as evidence in support of the claim, Miss *Pattle's* own affidavit made in support of the petition on which the order giving her liberty to go in before the *Master* and prove her alleged debt against the testator's estate, was made, although the petitioners objected to such affidavit being admitted as evidence. The petition then set forth the *Master's* report of the 23rd of April 1846, by which he found (as before mentioned) that there was not anything due, to Miss *Pattle*, from the testator's estate: and it prayed that that report might be confirmed, and that the petition on which the order, giving Miss *Pattle* liberty to go in and prove her debt, was made, might be

dismissed and that she might be ordered to pay the costs of the last-mentioned petition and order and of the proceedings under it, and of the now stating petition.

The petitions now came on to be heard.

Mr. *Bethell* for Miss *Pattle*.

The question is whether the bond which the testator executed to Miss *Pattle's* uncles and Mr. *Boodle*, was intended to remain in force, or only to answer a particular purpose, which has failed. I submit that it was intended to remain in force, and that Miss *Pattle* is now entitled to have the money secured by it, paid to her, with interest from the time when it was executed.

The testator, during a temporary absence from *Dacca*, which was the place of his residence, wrote a letter, to Miss *Pattle*, in order to guide her determination as to accepting or refusing the proposals of marriage which Mr. *Huddleston* had made to her. That letter contains the following passages:—"Mr. *Huddleston* asked, at parting, if he had my full consent. My answer was that if, on reflection, you freely consented to marry him, you had my full consent: if you decided otherwise, you would also have my full consent; as your own happiness and feelings I was bound to honour and support. Be assured, therefore, that, whatever your determination may be, it will obtain my approval: for, *as my child*, dutiful and affectionate as you have been to me, your happiness is my only wish." This letter shows, most clearly, that the testator had adopted Miss *Pattle*, and placed himself *in loco parentis* with regard to her. He did not, however, make any provision for her except by the bond in question; and that circumstance alone, ought to have

1848.

MITFORD v. REYNOLDS.

went to reside with his wife. In 1836 the testator died. Two years afterwards, a decree was made in a suit for the administration of his estate. In 1843 the bond was found, amongst his papers, with the word, "Cancelled" written across it. In 1844, which was twenty years after the bond was executed, Miss *Pattle* discovers that the testator executed the bond with the intention of making a permanent provision for her, whether the marriage took place or not. The presumption from all the circumstances of the case, is either that the bond was never delivered so as to be binding on the testator, or, if it was, that Miss *Pattle* relinquished her claim under it. In *Flower* v. *Marten* (*b*), a bond was given by a son to his father, in 1822. The father died in 1834, having lived, during the interval, in the utmost amity with his son, and without making any demand upon the bond. The Court presumed, from those circumstances and from the relation in which the parties stood to each other, that the father had abandoned all claim under the bond. Our case is much stronger than *Flower* v. *Marten:* for that was a suit to have a bond in the possession of a third party, delivered up. But we do not ask any such relief. We are merely resisting a claim made upon an instrument which, for twenty years, was considered as waste paper, and which is not proved, by any legitimate evidence, to have been ever out of the testator's possession. The circumstance of its having remained in the testator's possession, may not be sufficient, of itself, to invalidate it; but it greatly aids the presumption that all claim under it was relinquished.

Lastly, we contend that the bond and the settlement show that the testator intended to make, by the bond,

(*b*) 2 Myl. & Cr. 459; see pages 474 and 475.

not a permanent provision for Miss *Pattle*, independently of the marriage, but only a provision in the event of the marriage taking place.

If the testator had intended to make a permanent provision for Miss *Pattle*, he would have made her the obligee in the bond: but, instead of doing so, he made the trustees of the settlement the obligees. The settlement recites that the testator, *in prospect of the intended marriage*, had agreed to execute and, accordingly, had executed the bond; and also that *Huddleston*, in prospect of the intended marriage, had agreed to execute a bond. It then declares trusts, of the sums secured by those bonds and of the funds belonging to Miss *Pattle*, for the benefit of her and *Huddleston* and the children of their marriage. After which comes the proviso which was relied on, by Mr. *Bethell*, as the foundation of Miss *Pattle's* claim, namely, that, until the marriage should be solemnized according to the forms of the Church of *England*, or, in case it should not be so duly solemnized within twelve calendar months from the date of the settlement, the trustees should stand possessed of the trust-monies, securities and premises and the securities for the same, in trust for Miss *Pattle*, her executors, &c. Now we submit that a reasonable construction must be put upon the concluding words of that proviso, and that those words are governed by the recitals to which we have adverted: that is to say, that they must be construed, according to the familiar rule, "*reddendo singula singulis*;" or, as referring to Miss *Pattle's* trust-monies and securities: for it would be most unreasonable to hold that the parties intended that, if the marriage did not take effect, Miss *Pattle* should take, not only the money secured by the testator's bond, but also the money secured by *Huddle-*

1848.

MITFORD v. REYNOLDS.

ston's bond; which would be the result if Mr. *Bethell's* construction were adopted.

Mr. *Lloyd* with Mr. *Stuart* and Mr. *L. Wigram*.

Where a certain state of things is found to exist, and there is no evidence of any alteration in that state, the presumption of law, is that it has always existed. Here the bond and settlement were in the testator's possession at his decease; and, as Miss *Pattle's* affidavit was clearly not admissible to show that any change ever took place in the custody of those instruments, the presumption is that they were never out of the testator's possession.

No one will dispute, at the present day, that the mere fact of a person keeping a bond, which he has executed, in his possession, invalidates it at law. The law on that subject was very much discussed in *Hope* v. *Hope* (*d*), a case which was recently before the *Master of the Rolls*, and on the trial of an action between the parties; and the conclusion that was come to, was that, although the keeping of a voluntary deed in the possession of the party who has executed it, does not, of itself, invalidate the deed, it is always a circumstance to be looked at for the purpose of determining whether it was or not a complete instrument. The same question came before Sir *Thomas Plumer*, *M. R.*, in *Cecil* v. *Butcher* (*e*); and the proposition established by that case, is that, where a party executes a voluntary deed and keeps it in his possession for a purpose which has never been completed, the instrument has no opera-

(*d*) The hearing of this Cause on the equity reserved, is reported in 10 Beav. 181.

(*e*) 2 Jac. & Walk. 565.

tion in equity. Now the *laches* of Miss *Pattle* and all the other circumstances of this case, especially the recitals in the settlement and the circumstance of the testator having written on the bond: "Cancelled, the marriage not having taken place," tend to show that the testator, when he executed the bond, intended to make, not a permanent provision for Miss *Pattle*, wholly independent of the marriage, but a provision, by way of marriage portion, for her. If that be so, the fact of the marriage not having taken place, brings this case within *Hope* v. *Hope* and *Cecil* v. *Butcher* and the authorities on which Sir *Thomas Plumer* based his judgment in the latter case. The purpose for which the bond was executed, was not completed; and, therefore, it is not only an instrument on which relief cannot be granted in this Court, but one against which this Court would grant relief: *Birch* v. *Blagrave* (*f*).

Mr. *Lloyd* then contended that the circumstance of the bond being executed, not to Miss *Pattle* but to the trustees, showed that the testator intended the money secured by it to be a marriage-portion only; and that the recitals and operative part of the settlement led to the same conclusion. With respect to the proviso on which Miss *Pattle's* claim was mainly rested, he said that it applied only to Miss *Pattle's* funds, which were the only funds in existence at the date of the settlement and that it did not apply to the money secured either by the testator's or by *Huddleston's* bond; for those monies were not to be paid and, therefore, were not to become available to the purposes of the settlement, within the time limited for that proviso taking effect, namely twelve calendar months next after the execution of the settlement.

(*f*) Amb. 264.

1848.

MITFORD v. REYNOLDS.

Mr. *Twiss* and Mr. *Wray* for the *Attorney-General*, also opposed Miss *Pattle's* petition.

Mr. *Craig*, Mr. *Stevens* and Mr. *Leach* appeared for other parties.

Mr. *Bethell*, in his reply, said that Miss *Pattle's* affidavit had been rightly admitted as evidence: but whether it had or not, was quite immaterial; for Miss *Pattle* had been examined before the *Master*, on behalf of the parties who opposed her claim, and that, in her examination, she had deposed to the same facts as she had stated in her affidavit. He added that the words: "trust premises," were used in the parts of the settlement which preceded the proviso on which he relied; but, in that proviso, the words: "and the securities for the same," were added: and he cited *Barlow* v. *Heneage* (*g*).

The VICE-CHANCELLOR:

The only question that I have to determine, is whether, according to the true construction of the settlement, and having regard to the circumstances that have taken place, Miss *Pattle* has become the *cestui que trust* of the bond. Because it is not my duty to pronounce any opinion as to the legal validity of the bond: if there is any legal objection to it, *that* may be tried in an action on the bond; which the Court would permit to be brought, if there really was any legal objection. But I am bound to consider the bond as being, *primâ facie*, legal, and as one on which money might be recovered, provided only the case were such as that the Court should think it right that those persons who are named as the obligees and who are also the trustees of

(*g*) Prec. Ch. 210.

the settlement, ought to be permitted to sue on the bond for the benefit of Miss *Pattle*.

I have perused the settlement, very attentively, from beginning to end. It is impossible to read it without observing the unskilful manner in which it is drawn. but I must consider what is the true construction of it, in the state in which I find it.

Now the case was this: there was, more or less, an intention that Miss *Pattle* should marry Mr. *Huddleston*; but there certainly was an objection to the marriage, on the part of Mr. *Mitford*, grounded on this, that he did not favour those religious views which Mr. *Huddleston* had adopted; and he was very anxious, in the first place, that the marriage should be celebrated according to the forms of the Church of *England*: and he was also anxious (if the words of the settlement are to be taken in their strict and literal sense) that all the issue of the marriage should be brought up as members of the Church of *England*.

He executed a bond bearing date the 31st of October 1824, in a penal sum, by which he bound himself to pay 20,000 sicca rupees, on the 31st of October 1825; and an instrument was prepared, in the nature of a marriage settlement, which also was dated the 31st of October 1824, and was executed by Mr. *Huddleston*, by Miss *Pattle* and by Mr. *Mitford*, but not by any of the trustees. That settlement recited that a marriage was intended to be shortly had and solemnized between *Henry Joseph Huddleston* and *Eliza Henrietta Pattle*; and that Miss *Pattle* was entitled to stock in the £3 per Cents. and the £4 per Cents., and to an annuity of a

1848.

MITFORD v. REYNOLDS.

certain quantity of French money, which was greatly in arrear. The settlement next recites: "And whereas there is also a considerable arrear of dividends due under the said stocks or funds in *England*, and it is uncertain whether the same be or be not laid out or invested, in the purchase of additional stock or funds, for the benefit of the said *Eliza Henrietta Pattle*: and whereas, in prospect of the said intended marriage, the said *Robert Mitford* hath agreed to execute, and, accordingly, hath executed, the bond hereinafter more particularly mentioned, for securing, to the said *James Pattle*, *William Pattle* and *John Boodle*, the sum of sicca rupees, 20,000, and interest; and whereas the said *Henry Joseph Huddleston* hath also, in prospect of the said intended marriage, agreed to execute a bond to the said *James Pattle*, *William Pattle* and *John Boodle*, for securing the sum of sicca rupees, 10,000, and interest as hereinafter particularly mentioned; and whereas the said *Henry Joseph Huddleston* and *Eliza Henrietta Pattle* and the said *Robert Mitford*, are desirous of settling the said stock in the said funds in *England*, the said *Rente Viagere*, the said arrears of dividends or the stocks purchased therewith, in case any shall have been so purchased, and the sums secured by the said bonds respectively, together with the interest to accrue thereon, for the benefit of *themselves* and the issue of the said intended marriage." Here is one instance of the careless manner in which the settlement is prepared. It recites that the intended husband and wife and Mr. *Mitford*, are desirous of settling these sums for the benefit of themselves and the issue of the intended marriage. Then it recites Mr. *Mitford's* bond, and, next, Mr. *Huddleston's* bond. It takes notice of the fact that Mr. *Mitford's* bond had been delivered to the trustees; but there is no similar

recital as to Mr. *Huddleston's* bond. Then it proceeds thus: "And whereas it is proposed and agreed and declared, by and between the said parties to these presents, that the several stocks or funds of and belonging to the said *Eliza Henrietta Pattle* and standing in the name of the several persons whose names are inserted in the particulars upon these presents indorsed, together with the said *Rente Viagere*, and all other stocks or funds which may have been purchased by and with the produce of the said stocks or funds or any of them, should, as soon as circumstances will permit, be transferred and assigned to and into the names of the said *James Pattle*, *William Pattle* and *John Boodle*, or the survivors or survivor of them, and that the dividends and interest which may have been received and accumulated in the hands of the several persons in whose names the said several parcels of stocks now stand, should, in case the same may not yet have been laid out, pay over the same to the said trustees for answering the purposes of this settlement: Now this indenture witnesseth that, in order to carry the desire and intention of the said *Henry Joseph Huddleston* and *Eliza Henrietta Pattle*, his intended wife, and of the said *Robert Mitford*, into effect, and for declaring the several trusts, &c., subject to which the three trustees shall stand and be possessed of and interested in, as well as the said stocks or funds and *Rente Viagere* comprised in the said indorsed particulars, and all dividends, interest and monies which shall have arisen therefrom respectively, as also the sums to be received under and by virtue of the said two several bonds and the interest thereof, and of the securities for the same respectively, they the said *Henry Joseph Huddleston* and *Eliza Henrietta Pattle* his intended wife, and, with respect to the said sum of sicca rupees, 20,000, so secured by the bond of the said *Robert Mitford* and

1848.

MITFORD v. REYNOLDS.

the interest thereof, by and with the consent and full approbation of the said *Robert Mitford*, testified by his sealing and delivering these presents, do, by these presents declare," &c. Now it is very remarkable that there is this introduction of a particular consent and approbation of Mr. *Mitford*, as to his bond; but there is nothing similar introduced with respect to the bond given by *Huddleston*. Then it says that the trustees shall stand possessed and interested. Then we come to the ever-varying description of the things of which they are to stand possessed: "of and in the same stocks, funds, *Rente Viagere*, dividends, principal and interest monies respectively, and all and every sum and sums to be received thereby or thereunder respectively, and the interest, dividends and proceeds thereof, upon the trusts and to and for the ends, intents and purposes, and subject to the several powers, provisoes, and declarations and agreements hereinafter expressed and declared of and concerning the same: and they the said *Henry Joseph Huddleston* and *Eliza Henrietta Pattle* his intended wife, do hereby direct the said stocks, funds, *Rente Viagere*, dividends, monies and securities to be transferred and made over accordingly." Then the trustees covenant, with the intended husband and wife, that they, the trustees will: "when and so soon as the said stocks or funds in *England* comprised in the said particulars hereupon indorsed, and the said *Rente Viagere*, and other the stock which shall or may have been so purchased by and with the said dividends, each and every of them, shall be transferred into their names, or into the names or name of the survivors or survivor of them, or the executors or administrators of such survivor, and the dividends and proceeds thereof and therefrom, and also of and in * all sum and sums of money which shall or may be received by them, or the survivors

* *Sic.*

&c., as the accumulation of the dividends of the said funds and under or by virtue of the said two several bonds hereinbefore recited or referred unto, or any or either of them, or by any the means aforesaid, stand possessed and interested of and in the same, severally and respectively, and the securities for the same respectively, in trust, as soon as and if the circumstances of the case will admit and allow of, to call in and compel payment of the same respectively." That is the first trust: if circumstances will permit and allow, they are to call in and compel payment of those monies respectively; and, when they receive them, they are to lay out and invest them in the manner mentioned: and then they are to pay and deliver the interest, dividends, and produce and proceeds of the trust premises to the wife, for life for her separate use, and, after her death, to the husband. And then and there follow various trusts for the benefit of the children of the marriage, in which the epithet, "capital" is coupled with, "trust premises." But it is not necessary to make any other observation on those trusts, except that the education of the children is to be according to the Protestant religion of the Established Church of *England*. Then this declaration follows: "That, subject to the trusts hereinbefore declared for the benefit of the said *Henry Joseph Huddleston* and *Eliza Henrietta Pattle*, during their lives respectively, in case there shall not be any child of the marriage who, being a son, shall attain the age of twenty-one years, or, being a daughter shall attain that age or be married, then the trustees shall stand possessed of and interested in the said trust premises, and all dividends, interest and annual proceed and produce thenceforth to become due and payable in respect of the same respectively, and all accumulations thereof, upon trust to pay and transfer the same in manner following, that is to

1848.

MITFORD v. REYNOLDS.

say, as to the sum of sicca rupees, 10,000, which shall or may have been received, by the trustees, under and by virtue of the said bond of the said *Henry Joseph Huddleston*, and the securities for the same, in trust to pay, assign and transfer the same unto the said *Henry Joseph Huddleston* absolutely, in case he shall be then living, and, in case he shall be then dead, to his executors and administrators; and, as to all and singular other the said trust monies and premises and all accumulations thereof and therefrom and the securities for the same, in trust to pay, assign and transfer the same unto the said *Eliza Henrietta Pattle*, the intended wife of the said *Henry Joseph Huddleston*, absolutely, in case she shall be then living, and, in case she shall be then dead, then to the executors or administrators of the said *Eliza Henrietta Pattle* absolutely, without any condition whatsoever; and that, in respect thereof, any will or codicil, or instrument made and executed by her in the nature of a will or codicil, at any time during her coverture, (which the said *Henry Joseph Huddleston* doth hereby consent to her making) shall be effectual and pass the same, nevertheless, subject to the exercise of the power of appointment hereinbefore contained." Then comes this proviso: "Provided always, and it is hereby agreed and declared, by and between the said parties to these presents, that, until the said intended marriage shall be duly had and solemnized according to the forms of the Protestant Church of *England*." I must here observe that there is no previous direction that, until the marriage, the trustees shall stand possessed of the funds that come from the wife, in trust for the wife, and from the bond of *Huddleston*, in trust for him, and from the bond of Mr. *Mitford*, in trust for him; but everything which, in settlements drawn with any degree of skill, is made preliminary, is postponed to

this final clause. Then it goes on: "That, until the said intended marriage shall be duly had and solemnized according to the forms of the Protestant Church of *England*, or in case the same shall not be so duly solemnized within the space of twelve calendar months next after the date of these presents, then and in such case, the said *James Pattle*, *William Pattle* and *John Boodle*, and the survivors &c. shall and do stand possessed of and interested in all and singular the said trust monies, securities and premises, and the securities for the same, in trust for the said *Eliza Henrietta Pattle*, her executors, administrators and assigns, absolutely, without any further trust, end, intent or purpose whatsoever, and shall pay and assign and transfer the same accordingly; anything in these presents contained to the contrary thereof in anywise notwithstanding."

The fact is that no marriage ever took place. Then the question arises what is to be done in respect of those words.

Now the first thing to be observed, is that it is impossible to suppose that it was the intent and meaning of Mr. *Huddleston* to give a bond which was to be for the benefit of a lady whom he did not marry. That cannot be supposed for a moment. Common sense then requires that some limited construction should be put upon the words. Besides which there is this to be observed; that the trustees, as I have before stated, were to stand possessed of the bonds upon trust, as soon as and if the circumstances of the case would admit and allow of, to call in and compel payment of the sums secured by them; and I ask whether the circumstances of the case were in fact such as that this Court would have permitted the trustees, if they had had the personal possession of Mr.

1848.

MITFORD v. REYNOLDS.

Huddleston's bond, to have called in the money due on it, for the purpose of handing it over to the lady whom he expected to marry, and for whom and for whose children the sum secured by the bond was intended to be a provision, as a *douceur* for not marrying him. That cannot be the meaning of the words.

Then there is this also to be observed: namely, that a marriage might have been solemnized, between Miss *Pattle* and Mr. *Huddleston*, according to the rites of the Romish Church, and not according to the rites of the Church of *England*. In that case the proviso, if construed strictly, would have entitled Miss *Pattle* to the money secured by Mr. *Mitford's* bond. But there cannot be the slightest doubt that Mr. *Mitford* not only had no such intention, but meant quite the contrary. That being the case, I am not at liberty to construe the proviso literally; but I must put such a construction upon it as is consistent with common sense, and with the intention of the parties, as it is to be collected from other parts of the settlement. Accordingly, I hold that the proviso must be construed, *reddendo singula singulis*, that is to say that, in the event of the intended marriage not taking effect, the trustees were to hold Mr. *Mitford's* bond and the money secured by it, in trust for him; Mr. *Huddleston's* bond and the money secured by it, in trust for him, and Miss *Pattle's* stock and her other property, in trust for her.

Therefore, without entering into the question as to the validity of the bond, I shall declare that Miss *Pattle* is not entitled as *cestui que trust* of it.

The *Master's* report must be confirmed, and both of Miss *Pattle's* petitions must be dismissed with costs.

CARTER *v.* BARNARD, EX PARTE CARTER.

1848: 24th March.

Costs. Counsel.

The costs of employing two Queen's counsel for the Plaintiff, at the hearing, allowed; the second Queen's counsel having drawn the bill when he was without the bar.

AT the hearing of this Cause, two Queen's Counsel and one gentleman without the bar, appeared for the Plaintiff. The second Queen's Counsel drew the bill when he was without the bar. On the day on which the bill was filed, the Plaintiff's solicitor retained the senior Queen's Counsel. Before the Cause was heard, the other was called within the bar. The *Taxing-Master* disallowed the fee paid to and the other expenses occasioned by employing that gentleman at the hearing. Upon which the Plaintiff presented a petition insisting that the *Taxing-Master* ought to have allowed the fee and other expenses.

Mr. *Bethell* and Mr. *Heathfield* supported the petition.

Mr. *James Parker* opposed it. He said that, in taxing costs as between party and party, the rule was to allow the costs of only two Counsel, unless the Cause was one of great importance and the pleadings and evidence in it, were voluminous; in which case the costs of a third Counsel would be allowed: *Smith* v. *The Earl of Effingham* (*a*).

The *Vice-Chancellor* said that, ever since he had known the profession, the general rule had been, where the Counsel who drew the pleadings was made

(*a*) 10 Beav. 378.

1848.

CARTER v. BARNARD.

a Queen's Counsel before the hearing of the Cause, to employ him at the hearing; and that, if ever there was a case which required the services of that Counsel, it was this case; for the pleadings were framed with great skill and ingenuity; and the case was one of the most difficult and intricate that he had ever had to decide; therefore the Plaintiff's solicitor had acted, most judiciously, in giving a brief to the second Queen's Counsel; and the *Taxing-Master* ought to have allowed the expenses occasioned by employing him: and, consequently, he should direct the *Taxing-Master* to review his certificate.

1848: 24th March.

Appointment of New Trustees. Trustees.

The *Master* directed to *appoint* a new trustee, although some of the *cestuis que trust* were infants, and another was out of the jurisdiction.

HUNTER *v.* GIBSON.

THIS was a suit by five out of six *cestuis que trust* under a marriage-settlement, against the sole surviving trustee and the sixth *cestui que trust*, for the appointment of new trustees.

Three of the Plaintiffs were infants, and the *cestui que trust* who was a Defendant, was out of the jurisdiction: but, nevertheless, the Court, on the application of the Plaintiff's counsel and the trustee's counsel not objecting, referred it to the *Master* to *appoint*, (and not merely to approve of) a new trustee (*a*).

Mr. *James Parker* appeared for the Plaintiffs, and Mr. *Pole* for the trustee.

(*a*) See Seton on Decrees, 250.

IN THE MATTER OF THE SHEFFIELD AND LINCOLNSHIRE RAILWAY ACT. EX PARTE HODGE.

1848: 25th March.

Costs. Lands Clauses Act. Railway.

A. purchased green-acre for 1000*l.*, in lieu of black-acre which a railway company had taken from him, and for which they had paid 644*l.* into Court. The company were ordered to pay *A.* the same costs as he would have been entitled to under the 80th sect. of the Lands Clauses Act, if green-acre had cost 644*l.* only.

AFTER the railway company had taken a part of the petitioner's land, under their Act, with which the Lands Clauses Consolidation Act (8 & 9 Vict. c. 18) was incorporated, and had paid 644*l.* into Court in respect of it, the petitioner, for the purpose of re-investing that sum, agreed to purchase a piece of land for 1000*l.*, and obtained an order, in obedience to which the *Master* reported in favour of the title to it, and that the purchase was a fit and proper one wherein to re-invest the 644*l.* The petitioner then presented a petition praying that the report might be confirmed; that the *Master* might be directed to settle a proper conveyance for the purpose of carrying the agreement into effect; and, upon the *Master* certifying that the conveyance had been executed by the vendor, that the 644*l.* might be paid to the vendor; and that the *Taxing-Master* might be directed to tax the petitioner his costs, charges and expenses of re-investing the 644*l.* in land; of the inquiry before the *Master;* of the now stating petition and of all proceedings relative thereto respectively; and that such costs, charges and expenses might be paid to him by the company.*

Mr. *Bethell* and Mr. *Bloxam* appeared for the petitioner.

* See the 80th section of the Lands Clauses Act.

1848.

EX PARTE HODGE.

Mr. *Rolt* and Mr. *Ellison* for the company.

The company ought not to be subjected to any costs, except the costs of re-investing *their money* in land. In this case, not merely a few pounds, but a very large sum more than the company paid into Court, is to be invested in land. The larger the purchase is, the longer the abstract, and the greater the expenses will probably be. Where is the Court to stop? Would it have ordered the company to pay the costs if the money invested had been 10,000*l.*?

Ex parte Tetley (*a*) and *Ex parte Newton* (*b*) were referred to in the course of the argument.

The VICE-CHANCELLOR:

The petition in this case has avoided the objection in *Ex parte Tetley*; and the prayer of it asks nothing but what is strictly in accordance with the words of the 80th section of the Lands Clauses Act.

Order made according to the prayer.

(*a*) 4 Railway Cases, 55.
(*b*) 4 Young & Coll. Exch. Cases, 518.

CLARK *v.* WEBB.

1848:
18th April.

New Orders.
Parties.
Pleading.
Executors.

A cause cannot be set down on an objection for want of parties, under the 39th Order of August 1841, if the objection is founded on a fact stated in the answer but not in the bill.

One of two executors, who were stated to have possessed their testator's assets *jointly*, died before a suit was instituted for the administration of the testator's estate.

Held that the representative of the deceased executor, was not a necessary party.

THIS Cause was set down, under the 39th General Order of August 1841, to be heard on two objections, taken by the answer, for want of parties. The object of the suit was to have the separate property of the testatrix in the Cause, a married lady, accounted for and administered. The testatrix had appointed two executors; and both of them were stated to have proved her will and possessed her assets; but only one of them, (the other being dead,) was made a party.

One objection was that the personal representative of the deceased executor, ought to have been made a party; and *Williams* v. *Williams* (*a*) was cited in support of it.

The *Vice-Chancellor* overruled the objection, saying that the possession of assets spoken of in the bill, was a joint possession; and therefore the observation, made by Lord *Hardwicke* in the case cited, did not apply.

The other objection was that the representative of the testatrix's husband, who had survived his wife but was since dead, ought to have been made a party.

That objection was founded on the husband's having, as the surviving executor stated in his answer, served the Defendant with a written notice (which the answer set forth) that he claimed, by virtue of his marital right or otherwise, the whole of the property which the will purported to dispose of: and *Molony* v. *Kennedy* (*b*) was referred to in support of that objection.

(*a*) 9 Mod. 299. (*b*) *Ante*, Vol. X. p. 254.

1848.

CLARK v. WEBB.

The VICE-CHANCELLOR:

The 39th Order does not apply to a case like this, where the necessity for making an additional party, appears, not from the bill, but from a fact stated in the answer. A Plaintiff is not bound to take a matter of fact to be true, merely because the answer states it.

The second objection, therefore, must share the fate of the first(*c*).

Mr. *C. M. Roupell* supported the objections.

Mr. *Bethell* and Mr. *R. W. Moore* appeared to oppose them, but were not heard.

(*c*) See *Richardson* v. *Larpent*, 2 You. & Coll. C. C. 507.

MEMORANDUM.

Mapp v. *Ellcock*, reported *ante*, Vol. XV. page 568, has been reversed by the *Lord Chancellor*.

PRESTON *v.* MELVILLE.*
MELVILLE *v.* PRESTON.
MELVILLE *v.* PRESTON.

1848:
28th Jan.

Bonus.
Tenant for Life and Remainderman.
Dividend.
Income or Capital.

Tenant for life of Bank stock, held entitled to a bonus of one *per cent.* directed to be made out of the interest and profits on the capital stock of the Bank.

THE hearing of these Causes for further directions, is reported, *ante*, Vol. XV., page 35.

The order then made directed that Lady *Preston*, the Plaintiff in the first suit, should transfer, to the *Accountant-General*, 11,620*l.* 16*s.* 8*d.* Bank stock, and certain sums of Government stock; and that one third of the interest to accrue thereon should be paid to Lady *Preston* during her life or until further order, one other third, to the Defendant *Catherine Preston* during her life or until further order, and the remaining third, to the Defendant Lady *Hay* during her life or until further order.

At a General Court of the Governor and Company of the Bank of *England*, held on the 18th March, 1847, a motion that a dividend be made of 3*l.* 10*s.* *per cent.* interest and profits for the half year ending the 5th April then next, without any deduction on account of income tax, and that, in addition thereto, a bonus out of the interest and profits, be made of one *per cent.* on the capital stock of the Corporation, was made and carried, and was confirmed by ballot a few days afterwards.

On the 10th April, 1847, the *Accountant-General*

* *Ex Relatione* Mr. *Currey*.

Maclaren v Stainton 3 D. F. & J. 206.

1848.

PRESTON v. MELVILLE. MELVILLE v. PRESTON. MELVILLE v. PRESTON.

received 406*l.* 14*s.* 7*d.*, the amount of the dividend on the Bank stock, and 116*l.* 4*s.* 2*d.*, the amount of the bonus payable in respect of it in pursuance of the resolution of March, 1847.

Upon the hearing of a petition in the Causes, a question arose whether the tenants for life or the parties in remainder were entitled to the bonus.

It appeared that only one warrant was issued by the Bank for payment of the 406*l.* 14*s.* 7*d.* and 116*l.* 4*s.* 2*d.*, and that the Bank would pay both sums to a party holding a power of attorney for the receipt of dividends.

Mr. *Stuart* and Mr. *Currey* for the tenants for life, cited *Barclay* v. *Wainewright* (*a*).

Mr. *Lowndes* and Mr. *Dickinson* for the parties in remainder, submitted the point to the Court.

The *Vice-Chancellor* held that the tenants for life were entitled to the bonus as well as the dividend.

(*a*) 14 Ves. 66.

Price v. anderson. 15 Sm 474

IN THE MATTER OF THE LONDON AND SOUTHAMPTON RAILWAY EXTENSION ACT.

1848: 4th March.

Lands Clauses Consolidation Act. Railway Company. Costs. Deposit.

THE questions in this case arose upon the 80th, 82nd, 85th, and 87th sections of the Lands Clauses Consolidation Act, 8th and 9th Vict. c. 18.

Money paid into the Bank by a Railway Company under the 85th section of the Lands Clauses Act, ordered to be repaid to them, under the 87th section, without any deduction for costs payable by them to the land-owner.

The 80th sect. is, in part, as follows:—In all cases of monies deposited in the Bank under the provisions of this or the special Act or any Act incorporated therewith, except where such monies shall have been so deposited by reason of the wilful refusal of any party entitled thereto to receive the same, or to convey or release the lands in respect whereof the same shall be payable, or by reason of the wilful neglect of any party to make out a good title to the land required, it shall be lawful for the Court of Chancery in *England*, or the Court of Exchequer in *Ireland*, to order the costs of the following matters, *including therein all reasonable charges and expenses incident thereto*, to be paid by the promoters of the undertaking; (that is to say,) the costs of the purchase or taking of the lands, or which shall have been incurred in consequence thereof, other than such costs as are herein otherwise provided for, and the cost of the investment of such monies in Government or real securities, &c., &c.

The 82nd sect. enacts that the costs of all conveyances of lands to be purchased under the provisions of the Act or the special Act or any Act incorporated therewith, shall be borne by the promoters of the under-

1848.

IN THE MATTER OF THE LONDON AND SOUTHAMPTON RAILWAY EXTENSION ACT.

taking; and that such costs shall include all charges and expenses incurred, on the part as well of the seller as of the purchaser, of all conveyances and assurances of any such lands, and of any outstanding terms or interests therein, and of deducing, evidencing, and verifying the title to such lands, and of making out and furnishing such abstracts and attested copies as the promoters of the undertaking may require, and all other reasonable expenses incident to the investigation, deduction, and verification of such title.

The 85th sect. provides that, if the promoters shall be desirous of entering upon and using any lands before an agreement shall have been come to or an award made or verdict given for the purchase-money, it shall be lawful for them to deposit in the Bank, *by way of security*, either the purchase-money claimed by the party entitled to sell such lands, or such a sum as shall, by a surveyor appointed as therein mentioned, be determined to be the value of such lands, and also to give, to such party, a bond, with two sureties, in a penal sum equal to the sum so to be deposited, conditioned for payment, to such party, of all such purchase-money as may, in manner thereinbefore provided, be determined to be payable, by the promoters, in respect of the lands, with interest at 5*l. per cent.*, from the time of entering on the lands; and that, upon such deposit by way of security being made and such bond being delivered or tendered, it shall be lawful for the promoters to enter upon and use the lands.

The 87th sect. enacts that the money to be deposited shall remain in the Bank *by way of security*, to the parties whose lands shall so have been entered upon, for the performance of the condition of the bond; and that,

1848.

IN THE MATTER OF THE LONDON AND SOUTHAMPTON RAILWAY EXTENSION ACT.

upon the condition being fully performed, *it shall be lawful* for the Court to order the money to be repaid to the promoters, or, if the condition shall not be fully performed, to order the same to be applied in such manner as it shall think fit, for the benefit of the parties for whose security it shall have been deposited.

The *London* and *Southampton* Railway Company being desirous of entering upon and using certain lands, of which a lady named *Stevens* was the owner, before any agreement had been come to or award made or verdict given for the purchase-money, made a deposit and gave a bond pursuant to the 85th sect. of the Lands Clauses Act; and, when they had fully performed the condition of the bond, they presented a petition under the 87th sect., for repayment of the money so deposited by them.

On the hearing of the petition, one question was whether Mrs. *Stevens* was entitled to costs under the 82nd sect., (under which the *Taxing-Master* had taxed them,) or, as she contended, under the 80th sect., which authorizes the Court to order, not only the costs of the purchase or taking of the lands or which shall have been incurred in consequence thereof, but also *all reasonable charges and expenses incident thereto,* to be paid by the promoters of the undertaking.

The other question was whether the costs which Mrs. *Stevens* was entitled to, ought to be paid out of the money deposited.

Mr. *Stuart* and Mr. *Law* for the Company.

Mrs. *Stevens* is not entitled to costs under the 80th sect. of the Lands Clauses Act; for that sect. refers to

1848.

IN THE MATTER OF THE LONDON AND SOUTHAMPTON RAILWAY EXTENSION ACT.

monies deposited under *the prior* provisions of the Act, and not to monies deposited under the 85th sect. The monies in the former case, are to be paid over, under the directions of the Court, to the parties interested in the lands taken by the promoters of the undertaking, according to their shares and interests in such lands;* but the monies in the latter case, are to be a security only for the performance of the condition of the bond directed to be given by the promoters; and, when the condition has been fully performed, the Court is to order them to be repaid, together with the accumulation thereof, to the promoters. The only costs which Mrs. *Stevens* is entitled to, are those mentioned in the 82nd sect.; but she has no lien on the fund in Court, in respect of them.

Mr. *Bethell* and Mr. *Taylor* appeared for Mrs. *Stevens*.

The VICE-CHANCELLOR.

The 80th sect. applies to all cases of monies deposited in the Bank under the provisions of the general Act or the special Act or any Act incorporated therewith, except the four cases which are expressly excepted in it; and the case now before me, is not one of those excepted cases.

The 87th sect. does not imperatively direct the Court to order the money deposited to be repaid on the condition of the bond being fully performed: it merely says that it *shall be lawful* to the Court so to order: and, as it is but reasonable that the costs which the land-owner is entitled to, should be paid before the deposit is parted with, I shall refer it, to the *Master* of the Court in rotation, to inquire and state whether any charges and

* See the 78th section.

1848.

IN THE MATTER OF THE LONDON AND SOUTHAMPTON RAILWAY EXTENSION ACT.

expenses incident to the taking of the land, have been incurred by Mrs. *Stevens*; and I shall reserve the further consideration of this petition and of the costs of the reference, until the *Master* shall have made his report.

The *Lord Chancellor*, on appeal, reversed his Honour's order, and directed the money deposited to be repaid to the company (*a*).

(*a*) See *Ex parte Stevens*, 2 Phil. 772. See the next case.

EX PARTE THE GREAT NORTHERN RAILWAY COMPANY.

1848: 24th March.

Lands Clauses Consolidation Act. Railway Company. Costs. Deposit.

Money paid into the Bank, by a Railway Company, under the 85th section of the Lands Clauses Act, ordered to be repaid to them, under the 87th section, without any deduction for costs payable, by them, to the landowner.

THE Railway Company having fully performed the condition of a bond which they had given in pursuance of the 85th section of the Lands Clauses Consolidation Act, presented a petition, under the 87th sect., for repayment of 3300*l.* which they had paid into the Bank, in pursuance of the 85th sect., by way of security for the performance of the condition of the bond.

Mr. *Craig* appeared for the Petitioners.

Mr. *Pole*, for the owner of the land taken by the company, whose name was *Langham*, contended that his client was entitled, *under the 80th section of the Act*, to be paid the following costs out of the 3300*l.*; namely, the costs of the jury-process, by which the compensation to be paid for the land, had been assessed

1848.

EX PARTE THE GREAT NORTHERN RAILWAY COMPANY.

at 5000*l.* (*a*); the costs of the conveyance and of deducing, evidencing, and verifying the title to the land, and of making out and furnishing abstracts of the title, and the reasonable expenses incident to the investigation, deduction and verification of the title, and also the costs of a suit which *Langham* had instituted to restrain the Company from pulling down any buildings on the land, &c., until the amount of the compensation should have been ascertained by a jury. He said that the words in the 80th section: "other than such costs as are herein otherwise provided for," referred to costs which the 34th, 51st, 91st and some of the other sections of the Act, directed to be paid, in certain events, by *the land-owner*, and not to costs which the promoters of the undertaking, were liable to pay.

The *Vice-Chancellor* directed the *Taxing-Master* to tax Mr. *Langham* the costs of the conveyance, including all charges and expenses, incurred by him, of all conveyances and assurances of the land taken by the company or of any outstanding terms or interests therein, and of deducing, evidencing and verifying the title to such lands, terms or interest; and of making out and furnishing such abstracts and attested copies as the company required; and all other reasonable expenses incident to the investigation, deduction and verification of such title (*b*); and his costs, (including all reasonable charges and expenses incident thereto,) of the purchase or taking the land or which he had incurred in consequence thereof, *including his costs of the suit*, and the costs of the now stating order and relating thereto (*c*)

(*a*) See the 23rd and 39th and the fourteen next sections of the Act, particularly the 51st, 52nd and 53rd.

(*b*) See the 82nd section.

(*c*) See the 80th section.

and also the costs of the inquiry before the jury (*d*); and that the amount of such costs, when taxed, should be paid out of the money in the Bank, and that the remainder of it should be paid to the secretary of the Company.

On the 29th of May 1848, the *Lord Chancellor*, on the application of the Company, discharged the above order, and directed the whole of the money paid by them into the Bank, to be paid out to their secretary (*e*). His Lordship prefaced his order with the following judgment.

The Act directs the promoters to pay the expense of the jury in certain cases. It directs the promoters to pay the costs of the conveyance, and it directs the mode in which those costs are to be ascertained and paid, and the remedy for those costs if they are not paid. So far the Act is imperative. It imposes a duty and gives the remedy. Then comes the 80th section, which gives the Court discretion; but it is a discretion as to costs applicable only to cases other than those in which the costs are otherwise provided for. Now the costs are otherwise provided for, both as to the expense of the jury-process and as to the expense of the conveyance. It is impossible, therefore, to bring it within the 80th section. Then, if it is not within the 80th section, there is no provision in the Act giving the Court discretion and power as to costs. There is no discretion to be exercised in a matter in which the Act is imperative.

(*d*) See the 51st section.
(*e*) Reg. Lib. A. 1847, fol. 1454.

1848.

EX PARTE THE GREAT NORTHERN RAILWAY COMPANY.

There is an order which says the costs shall be paid, but it is not left for the Court to direct. The Act has directed it, and the payment is to be enforced in a particular mode. The costs to be paid by the promoters, are left to the Court under the 80th section: but that is only as to costs which are not otherwise provided for. With respect to the costs of the suit, as I have already said, they ought not to be included in this order: they are not under the Act at all. The suit in equity arises, it is true, in consequence of the provisions of the Act; but it is not an application under the Act. The proceeding is not under the Act; but, on the contrary, a proceeding to prevent the parties from violating the Act; so that, in no case, can the costs of the suit be considered as costs provided for by the Act; it means only costs incurred by the prosecution of the provisions of the Act.

I think, therefore, that the two classes of costs which are the subject of this discussion, ought not to be included in the order. It is quite unnecessary they should. There is ample power, in the Act, for the payment of the costs. The costs of the suit will be disposed of in the branch of the Court to which that suit belongs; but the others are disposed of by the provisions of the Act: therefore, I think the order must be altered as prayed (*a*).

(*a*) 5 Railway Cases, 272. See the next case.

LANGHAM *v.* THE GREAT NORTHERN RAILWAY COMPANY.

1848: 8th June.

Costs. Staying Proceedings in a Suit.

THE further prosecution of this suit having become wholly unnecessary, in consequence of the Company having paid the 5000*l.* to the Plaintiff,

All the purposes of a suit having been answered, the Plaintiff moved, before answer, that his costs might be taxed and paid by the Defendant, and that, thereupon, all further proceedings might be stayed. Motion refused.

Mr. *Bacon* and Mr. *Pole*, on his behalf, moved before *Vice-Chancellor Knight Bruce*, to whose Court the Cause was attached, that the Plaintiff's costs of the suit and of the now stating application, might be taxed, and that the Company might be ordered to pay those costs, when taxed, to the Plaintiff; and that, thereupon, all further proceedings in the suit might be stayed. They cited *Sivell* v. *Abraham* (*a*) and *Winter* v. *Vizitelli* (*b*).

Mr. *Wigram* and Mr. *Denison*, for the company, said that the motion was irregular; and that, in *Sivell* v. *Abraham*, the Defendant had put in his answer, and in *Winter* v. *Vizitelli*, the application was not opposed, and the party had agreed to pay the costs.

The *Vice-Chancellor* on being informed that the Company had not answered the bill, said:

Assuming that the Defendants have, in effect, admitted that the Plaintiff was justified in filing the bill by reason of wrong or error on their part, and that that

(*a*) 8 Beav. 598.

(*b*) *Coram* the *Vice-Chancellor* of *England* on the 27th of April 1848, and reported in the *Legal Observer* for that year.

1848.

LANGHAM v. THE GREAT NORTHERN RAILWAY COMPANY.

wrong and error have been redressed and every thing that the Plaintiff desired has been done, and, therefore, the suit has no longer any object, it seems to me to be quite clear what ought, according to reason and common sense, to be the result. But the Defendants are entitled to file their answer, in order that it may read as evidence on the question of costs. Therefore, though I think that, according to reason and common sense, the motion ought to be granted, I must refuse it.

Mr. *Wigram* and Mr. *Denison* then asked for the costs of the motion, and cited *Malins* v. *Price* (*a*).

His Honour reserved the costs until the hearing of the Cause.

(*a*) 2 Coll. 190.

1848: 2nd August.

Lands Clauses Consolidation Act. Railway Company.

IN THE MATTER OF THE EAST INDIA DOCKS AND BIRMINGHAM JUNCTION RAILWAY ACT, AND OF THE LANDS CLAUSES CONSOLIDATION ACT.

EX PARTE BRADSHAW.

A land-owner refused to accept purchase-money awarded to be paid to him by a Railway Company, because he believed the award to be invalid in law. The Judges of the Court of Queen's Bench, after hearing the question argued at great length and taking time to consider their judgment, decided that the award was valid.

Held that the land-owner's refusal to receive the money, was not a wilful refusal within the meaning of the 80th section of the Lands Clauses Act.

IN this case, the Railway Company, in consequence of the Petitioner having refused to accept from them, 2560*l.*

In re London & Ry 12. Beav. 522

which had been awarded to him for the purchase of certain lands of which he was the owner and which they required for the purposes of their undertaking, paid the money into the Bank under the 76th sect. of the Lands Clauses Act. The petitioner refused to accept the money because, as he deposed, he conscientiously believed the award to be invalid in law: and, under that impression, he obtained a rule, from the Court of Queen's Bench, calling upon the Company to show cause why the award should not be set aside. The case was argued, at great length, on the 2nd of May 1848; and, at the conclusion of the argument, the Judges took time to consider their judgment. On the 2nd of June following, they discharged the rule.

The question, on the hearing of the petition, was whether the money had been deposited in the Bank: "by reason of the *wilful refusal* of the Petitioner to receive the same" (*a*).

Mr. *Bethell* and Mr. *Sheffield* appeared for the Petitioner, and

Mr. *Lloyd* for the Company.

The *Vice-Chancellor* said that the legislature meant by the words, "wilful refusal," a refusal arising from an exercise of mere will or caprice, and not from an exercise of reason: and that, as the Petitioner's objections to the award, had been argued at great length, and the Judges of the Court of Queen's Bench had taken time to deliberate before they pronounced judgment upon them, they could not have been captious or unsubstantial

(*a*) See the 80th sect. of the Lands Clauses Act, *ante*, p. 165.

1848.

EX PARTE BRADSHAW.

objections; and, therefore, the refusal of the Plaintiff to accept the money when the Company tendered it to him, was not a wilful refusal.

1848: 7th March.

Joint-stock Company. Pleading. Demurrer.

Demurrer allowed to a bill filed by Plaintiffs on behalf of themselves and the other shareholders in a company, because the bill did not allege that the Plaintiffs were shareholders in the company.

BANKS *v.* PARKER.

THE Plaintiffs in this case, sued on behalf of themselves and the other partners or shareholders in a joint-stock company. The bill alleged that the Plaintiffs were directors and trustees, but it did not allege that they were shareholders or partners in the company; and, on that account, the Defendants demurred to the bill.

Mr. *Rolt* and Mr. *Giffard*, in support of the demurrer, cited *Walburn* v. *Ingilby* (*a*) and *The King of Spain* v. *Machado* (*b*).

Mr. *Stuart* and Mr. *Prior* supported the bill.

The *Vice-Chancellor* overruled the demurrer, but the *Lord Chancellor* reversed his Honour's order.

(*a*) 1 Myl. & Keen, 61, see 77. (*b*) 4 Russ. 225.

WEBSTER *v.* BODDINGTON.

1848:
10th March.

Appointment. Power.

Testator empowered his executors for the time being, to advance to his nephew any sum or sums of money not exceeding 30,000*l.* The executors exercised the power to the extent of 20,000*l.*

Held that they were not precluded, thereby, from making a further advance to the nephew.

The case of *Brown* v. *Nisbett*, 1 Cox, 13, observed upon.

THE testator in this Cause empowered his executors for the time being to advance, to his nephew, any sum *or sums* of money not exceeding 30,000*l.*

The executors exercised the power to the extent of 20,000*l.*; and the question was whether, as they had done so, they were not precluded from advancing a further part of the 30,000*l.* to the nephew.

Mr. *Lloyd*, for the Plaintiff, said that some doubt was thrown upon the question by the case of *Brown* v. *Nisbett* (*a*).

Mr. *Rolt* appeared for the Defendants.

The VICE-CHANCELLOR:

The judgment attributed to the *Lord Chancellor* in the case cited, is not very intelligible; but the effect of it seems to be that, after the husband and wife had executed the power, jointly, it could not be exercised by the survivor of them. That case, therefore, has no application to the present.

Here the power has not been fully executed, and the words, "sum or sums of money," and, "my executors for the time being," are used: therefore, I think that the executors are at liberty to advance the remaining 10,000*l.* to the nephew.

(*a*) 1 Cox, 13. Qu.: whether the word, 'their,' in the first line of page 15, is not a misprint for, 'her.'

1848:
15th, 16th, 18th and 21st March.

Deed. Mistake.

A. being seised of estates in *C.*, and having proposed to settle a certain part of them on his marriage, a settlement was made of all his estates in *C.*, which were intended to be specified and described in the schedule thereunder written, "*but which schedule is not intended to abridge or affect the generality of the description hereinbefore contained.*" Held, from the proposal and other evidence, that the words in italics, were inserted by mistake.

WALSH *v.* TREVANNION.

BY a deed dated in 1823, certain estates in *Cornwall*, were limited to such uses as Mr. *Trevannion* and his son should appoint. In 1824 they mortgaged part of those estates to the Bank of *England*. In 1827, the son being engaged to a lady whom he shortly afterwards married, his father and he proposed, in writing, to settle the estates *comprised in the mortgage*, (subject to that incumbrance) on the father for life, remainder to the son for life, remainder to the first and other sons of the latter in tail; and the proposal was submitted to and approved of by the lady's mother and her professional adviser. The settlement made on the marriage, after reciting the deed of 1823 and the mortgage to the Bank, limited, in the manner proposed, all the estates of the father and son in *Cornwall* which were intended to be specified and described in the schedule thereunder written; *but which schedule*, it added, *was not intended to abridge or affect the generality of the description thereinbefore contained.* The schedule comprised only the property mortgaged to the Bank. In and after 1829, the father and son mortgaged the rest of their estates in *Cornwall*, to different persons, and treated them, in other respects, as being at their own disposal.

The bill was filed by those mortgagees, alleging that the words in italics were inserted, in the settlement, by mistake, and praying for a declaration to that effect and that the mistake might be corrected; or that it might be declared that, according to the true construction of

Rooke v. Ld Kensington 2 Kay & J. 753. 773.
Boyd v. Petre 10 Eq. 466. Rev. 7 Ch. 390

the settlement, no property was appointed or conveyed by it except that comprised in the schedule.

Evidence was entered into on both sides.

Mr. *Bethell* and Mr. *Willcock* for the Plaintiffs, cited *Cole* v. *Knight* (*a*); *Payler* v. *Homersham* (*b*); *Bailey* v. *Lloyd* (*c*); and *Alexander* v. *Crosbie* (*d*).

Mr. *James Parker*, Mr. *Malins*, Mr. *Twells*, Mr. *Renshaw*, Mr. *Glasse*, Mr. *Archibald Smith*, Mr. *Nicholls* and Mr. *Smale*, appeared for Defendants in the same interest as the Plaintiffs.

Mr. *Stuart*, Mr. *Rolt*, and Mr. *Beavan*, appeared for the Defendant, the only son of the marriage, who was an infant.

The *Vice-Chancellor* said that the evidence for the Defendant was loose and vague, and was greatly outweighed by the proposals for the settlement and by the fact that, after the marriage, the father and son dealt with their estates not comprised in the mortgage to the Bank, as if they were their own absolute property: and, therefore, that he should declare that it was the intention of the parties that only those tenements should be settled which were comprised in that mortgage; and that he should send a case to the Court of Queen's Bench, for the opinion of the learned Judges as to whether, according to the true construction of the settlement, any tenements were appointed or released by

(*a*) 3 Mod. 277.
(*b*) 4 Mau. & Sel. 423.
(*c*) 5 Russ. 330.
(*d*) Lloyd & Go. 145.

1848.

WALSH
v.
TREVANNION.

it, other than those which were comprised in the mortgage.

1848:
15th June.

Infant.
Decree.
Day to show Cause.

At the hearing of a Cause to which an infant, who was the first tenant in tail under a settlement, was a Defendant, the Court made a declaration as to the intention of the parties to the settlement, which bound the infant's inheritance, and sent a case for the opinion of a Court of Law as to the true construction of the settlement; but, it refused to give the infant a day to show cause against the decree until the hearing on the equity reserved, when it would appear whether the infant would be required to execute a conveyance or not.

On this day the minutes of the decree were discussed.

The question was whether a day to show cause against the decree, ought to be given to the infant Defendant, who was entitled to the first estate of inheritance under the settlement.

Mr. *Stuart* and Mr. *Beavan*, for the infant.

An infant Defendant to a foreclosure-suit, is not required to execute a conveyance or do any other act; nevertheless, a day is always given to him to show cause against the decree. Here the infant will be required to execute a conveyance, if the Court of Law should decree that other lands than those mortgaged to the Bank, passed by the settlement. Besides, the infant's inheritance is bound by the declaration in the decree that, according to the agreement for the settlement, it was not the intention of the parties that any estates should be included in it, except those comprised in the mortgage to the Bank; and, therefore, a day to show cause against the decree, ought to be given to him: *Powys* v. *Mansfield* (*a*); *Price* v. *Carver* (*b*); *The Marquis* v. *The Marchioness of Exeter* (*c*); and *Seton* on Decrees, 266.

(*a*) *Ante*, Vol. VI. page 637.

(*b*) 3 Myl. & Cr. 161.

(*c*) *Ibid.* 321.

1848.

WALSH v. TREVANNION.

Mr. *Bethell* and Mr. *Willcock*, for the Plaintiffs, said that the rule was, not to give an infant Defendant a day to show cause, unless the decree directed him either to execute a conveyance, or to be foreclosed; *Sheffield* v. *The Duchess of Buckingham* (*d*).

The VICE-CHANCELLOR:

The decree does not require the infant to perform any Act: it is merely preliminary.

If the Judges of the Court of Queen's Bench should be of opinion that no estate passed by the settlement except the one mortgaged to the Bank, there will be nothing for the infant to do. But, if they should hold that other estates did pass, it will be necessary for the infant to execute a conveyance; and then a day to show cause against the decree, must be given to him: but there is no necessity for giving it at present.

(*d*) 1 West's Reports, 684, and see Seton on Decrees, 267.

1848:
23rd March.

Pauper. Practice. Personal Representative.

A. being executrix of a will and entitled under it to an equity of redemption, filed a bill to redeem, *offering to pay what, if anything, should be found due on the mortgage,* and praying for relief as the testator's representative.

Held that she could not sue as a pauper.

FOWLER *v.* DAVIES.

THE Plaintiff (who had obtained an order to prosecute the suit *in formâ pauperis*) was the executrix of her late husband's will and entitled, under it, to an estate, subject to a mortgage which was vested in the Defendants. The bill alleged that the mortgage had been paid off or nearly so, and prayed for an account of what was due on it and for a reconveyance of the estate, the Plaintiff offering to pay what, if anything, should be found due; and also that certain property belonging to the testator, might be sold and the proceeds applied in satisfaction of the mortgage, and that the surplus might be paid, to the Plaintiff, as the testator's personal representative.

Mr. *Rolt*, for the Defendants, now moved to dispauper the Plaintiff, on the ground that it was contrary to the practice of the Court to allow a personal representative to sue as a pauper.

Mr. *Amphlett*, for the Plaintiff, said that the Plaintiff was suing, not merely as executrix, but as entitled to the equity of redemption in her own right; and, therefore, the order was regular. *Thompson* v. *Thompson* (*a*), *Paradice* v. *Sheppard* (*b*), *Anon.* (*c*).

The VICE-CHANCELLOR:

As the Plaintiff offers to redeem the mortgage if any-

(*a*) Beames on Costs, 2nd edition, page 79.

(*b*) 1 Dick. 136, and stated from Reg. Lib., in the Appendix to Beames on Costs.

(*c*) 2 Molloy, 338.

thing shall be found due on it, she must have something to redeem with; and, therefore, it seems to be irregular to allow her to sue as a pauper.

1848.
FOWLER v. DAVIES.

Motion granted.

WROE *v.* CLAYTON.

1848: 23rd March.

Contempt. Practice. Affidavit.

IN February 1843, the bill in this Cause, was dismissed with costs. On the 24th of October 1844, an attachment for non-payment of the costs, directed to the Sheriff of *Lincolnshire* and made returnable on the 15th of December following, was issued against the Plaintiff, on an affidavit sworn on the 3rd of July 1843. On the 2nd of November 1844 the Plaintiff was taken under the attachment, and committed to *Lincoln* Jail, where he still remained. A motion was now made, on his behalf, that the attachment might be set aside for irregularity, and that he might be discharged out of custody.

Mr. *Teed*, in support of the motion, said that, as the attachment was made returnable after the end of the term in which it was tested, it was irregular; for it was laid down, in the books of practice, that an attachment could not have a longer return than the last return of more than fifteen days

The position, laid down in the books of practice, that an attachment cannot have a longer return than the last return of the term following that in which it is issued, is not well founded.

An attachment issued in vacation under 11th Geo. IV. and 1 Will. IV. c. 36, sect. 15, rule 3, may be made returnable after it is tested.

The party prosecuting process of contempt, is not bound to bring the prisoner to the bar of the Court, in order that he may be turned over to the Queen's Prison.

An attachment upheld, although the affidavit on which it was obtained, was sworn fifteen months previously.

1848.

WROE v. CLAYTON.

the term following that in which it was tested: and that if it was made returnable immediately, it was only in force until such last return of the following term; and if, in either case, it was executed afterwards, it was liable to be discharged for irregularity. (*a*)

The VICE-CHANCELLOR:

Neither Mr. *Daniell* nor Mr. *Smith* cite any authority for the position laid down by them; and I have reason to know that the practice of the officers of the Court, is at variance with it.

Mr. *Teed*, secondly, objected that, under the 3rd rule of 11th Geo. IV. and 1 Will. IV. c. 36, sect. 15, the writs for contempt, if issued in the vacation, must be made returnable fifteen days after they were tested; but the writ, in the present case, was made returnable much more than fifteen days after it was tested, and was executed after the expiration of those fifteen days.

The VICE-CHANCELLOR:

Has there been any case on the subject?—The construction which you contend for, is not the natural construction of the Act. It provides only that there shall be fifteen days, that is, fifteen days at the least, between the teste and the return of the writ. And I find, on referring to my notes, that, on the 18th of July 1840, I held, in a case of *Willisford* v. *Fortescue*, that the writ was good notwithstanding there were more than fifteen days between the teste and the return of it.

Mr. *Teed*, thirdly, objected that the party prosecuting the contempt, ought to have brought the Plaintiff to the

(*a*) See 1 Dan. Prac. 578, and 1 Smith's Prac. 126.

1848.

WROE v. CLAYTON.

bar of the Court and had him turned over to the Queen's Prison, in order that he might have the benefit of the provisions of the Act. He referred to the 2nd section and to the 7th, 8th, 17th, 18th and 20th rules of the 15th section.

The VICE-CHANCELLOR:

If the Plaintiff did not like his confinement in *Lincoln* Jail, he might, himself, have applied for a *habeas corpus*.

Mr. *Teed*, lastly, objected that the affidavit on which the attachment was obtained, was made fifteen months previously.

The VICE-CHANCELLOR:

Is an affidavit the less true because it has been made fifteen months? That is no objection unless (which you do not allege) something has occurred since it was sworn, which alters the state of the case. The Plaintiff has no right to complain because indulgence has been shown him. Upon the whole, I do not see any ground for interfering in this case.

Motion refused.

1848:
24th March.

Legacy. Priority. Will. Construction. Abatement of Legacy.

ASHBURNHAM *v.* ASHBURNHAM.

Testator gave legacies to different persons, and an annuity for the personal maintenance and support of his brother, and directed the payment of it to commence on the first half-yearly day after his death, and the legacies to be paid at the expiration of two years after that event, or as much sooner as the circumstances of his estate would permit, but, without interest in the mean time. The testator's property was insufficient to pay the legacies and annuity in full.

THE will of the testator in this Cause, after disposing of part of his real estates and giving legacies to his servants, his brother *George*, and other persons, proceeded thus: "And I direct that all the aforesaid legacies, except those to my servants (which shall be paid as soon as conveniently can be) shall be paid *at the expiration of two years from the day of my decease*, and without interest in the mean time, or as much sooner as my executors, in their discretion, shall consider the circumstances of the estate will permit. I give, to my trustees hereinbefore named, an annuity of 100*l.* during the life of my said brother *George*, upon trust to apply the same, by equal half-yearly payments on the 25th of March and 29th of September in each year (*the first payment thereof to commence on such of the said days as shall happen next after my decease*) *towards the personal maintenance and support* of my said brother during his natural life or until he shall attempt to alienate, mortgage or in any manner charge or incumber the same or any part thereof, or shall become bankrupt or insolvent: and, from and after his decease or the happening of any of the said events, I direct that such annuity shall cease, and the property from which the same shall arise or be paid, *shall fall into and become part of my personal estate and be applied and disposed of accordingly*. And I direct my said trustees either to *set apart a sufficient part of my estate to pay the said annuity*, or to invest a

Held that the annuity was not entitled to priority over the legacies, but must abate, proportionably, with them.

1848.

ASHBURNHAM v. ASHBURNHAM.

sufficient sum in the purchase of a Government life-annuity." The testator then gave his residuary estate to the trustees, in trust to sell and convert the same into money, and to stand possessed of the monies to arise therefrom, in trust, in the first place, to pay his funeral and testamentary expenses, debts, legacies and annuities, and the expenses of executing the trusts of his will; and, if the residue of the monies to arise from such sale and conversion, should not amount to 500*l.*, to stand possessed thereof for the absolute use and benefit of his wife, but, if it should amount to or exceed that sum, to stand possessed of it upon certain other trusts.

The bill was filed, by the testator's widow, to have the trusts of the will carried into execution. The testator's personal estate being insufficient to pay his debts, legacies and the annuity, the question at the hearing for further directions, was whether the annuity was charged upon the real estates, and, if it was not, whether it was entitled to priority over the legacies.

Mr. *Bethell* and Mr. *Hislop Clarke*, for the Plaintiff, and

Mr. *Stuart*, Mr. *Pole* and Mr. *W. T. S. Daniel*, for Defendants in the same interest, said that it was evident, from the will, that the testator contemplated that his personal estate would be more than sufficient to pay his debts, legacies and the annuity; and that he intended the legacies to have priority over the annuity, rather than the converse; for the legacies were given before the annuity. They cited *Beeston* v. *Booth* (*a*) and *Thwaites* v. *Foreman* (*b*).

(*a*) 4 Madd. 161. (*b*) 1 Coll. 409.

1848.

ASHBURNHAM v. ASHBURNHAM.

Mr. *Rolt* and Mr. *Lewis*, for the annuitant, said, first, that the annuity was charged on the testator's real estates, for the testator had directed the trustees of his will, to set apart a sufficient part of his estate to pay the annuity; and that the word, "estate," included real as well as personal estate: Secondly, that the annuity was distinguished from the legacies, and was entitled to be paid in priority to them, first, because it was given for the personal maintenance and support of the annuitant; secondly, because the payment of it was to commence on the first half-yearly day of payment after the testator's death; so that, if he had died on the 24th of March, it would have been payable on the very next day, but the legacies were not to be paid until the expiration of two years after his death; and, Thirdly, because the legacies were directed to be *paid out of* the residue, but the annuity-fund was to *fall into* the residue on the annuitant's death, and then to be applicable to pay the legacies. They relied on *Brown* v. *Brown* (*c*) as being precisely in point.

Mr. *Renshaw* appeared for another party.

The VICE-CHANCELLOR:

It seems to me to be quite plain that the annuity is not entitled to priority over the legacies. The testator has not said that it should have priority in point of security; nor can it be inferred that he so intended, without putting a forced construction on the language of his will.

He has first given certain legacies, some of which were to be paid as soon as conveniently could be after

(*c*) 1 Keen, 275.

1848.

ASHBURNHAM v. ASHBURNHAM.

his death, and the rest, at the expiration of two years after that event. Then he says: "I give my said trustees an annuity of 100*l.* during the life of my brother, upon trust to apply the same, by two equal half-yearly payments on the 25th of March and the 29th of September in each year (the first payment thereof to commence on such of the said days as shall happen next after my decease,) towards the personal maintenance and support of my brother during his natural life or until he shall attempt to alienate, mortgage, or, in any manner, charge or incumber such annuity or any part thereof, or shall become bankrupt or insolvent; and, from and after his decease or the happening of any of the said events, I direct that the annuity shall cease and the property from which the same shall arise or be paid, shall fall into and become part of my residuary estate." That points to the property out of which the annuity should have been paid, having been previously taken out of his personal estate. Then, after making a disposition of his real estates, under which his brother *George* takes by way of remainder, he gives the residue of his property to the trustees, in trust to sell and convert the same into money, and to stand possessed of the proceeds in trust, in the first place, to pay and satisfy his funeral and testamentary expenses and debts, and the pecuniary legacies and annuities thereinbefore given, and the expenses of executing the trusts of his will. So that he directs his funeral and testamentary expenses, debts, legacies and annuities to be paid, *uno flatu*. And it is plain that he contemplated that there would be a surplus after they were paid; for he says that, if the residue of the monies to arise from his residuary estate after such payment, should not amount to 500*l.*, the trustees should stand possessed of it in trust for his wife, and, if it should amount to or exceed that sum,

1848.

ASHBURNHAM v. ASHBURNHAM.

that they should stand possessed of it upon other trusts. So that the notion could not have arisen in his mind that, in order to secure his brother's annuity, there was any necessity for its having priority over the legacies; for he did not contemplate that there would be a deficiency.

1848: 25th January.

Copyright. Encyclopædia.

The proprietor of an *Encyclopædia* who employs a person to write an article for publication in that work, cannot, without the writer's consent, publish the article in a separate form or otherwise than in the *Encyclopædia*, unless the article was written on the terms that the copyright therein should belong to the proprietor of the *Encyclopædia*, for all purposes.

THE BISHOP OF HEREFORD *v.* GRIFFIN.

IN 1833 the Plaintiff, at the request of Messrs. *Baldwin* and *Cradock*, the original proprietors of the *Encyclopædia Metropolitana* which was then in the course of publication, wrote an article or essay on the life of *Thomas Aquinas*, for the purpose of its being inserted in the *Encyclopædia*, and sent it to them, and they paid him for it and printed and published it as part of the *Encyclopædia*. In 1847 the Defendants, who had then become the proprietors of the *Encyclopædia*, being about to reprint the article or essay and publish it as a separate work, the bill was filed alleging that the Plaintiff composed the article or essay and sold it to *Baldwin* and *Cradock* for the purpose of its being printed and published as part of the *Encyclopædia* and not otherwise; and that he had never consented or agreed to its being published as a separate work; and praying that the Defendants might be enjoined from printing, publishing or selling any copies or copy of the article or essay, as a separate or distinct book, or otherwise than as part of the *Encyclopædia*.

The facts stated in the bill having been verified by affidavit, the Court granted the injunction on an *ex parte*

application. The Defendants, afterwards, put in their answer, in which, after admitting that the Plaintiff composed the article or essay for the purpose of its being printed and published as part of the *Encyclopædia*, and stating that he was paid for it after the usual rate at which authors were paid for articles contributed to that work, said that all such articles, were, as they believed, uniformly composed upon the terms that the copyright in them, should, for all purposes, belong, exclusively, to the publishers and proprietors of the *Encyclopædia*, except in those instances in which special agreements were made for the reservation, to such authors, of liberty to publish their articles in a separate form; and that they believed that the ordinary terms of contract were adopted between the Plaintiff and the then publishers of the *Encyclopædia*, and that no special agreement was entered into between them and the Plaintiff; and that, in the absence of any special agreement to the contrary, articles contributed to an *Encyclopædia*, were, according to the custom prevalent in the trade and amongst authors, always understood to be contributed on the terms that the copyright in them should belong to the publishers of the *Encyclopædia*, for all purposes. They further stated that, in May 1847, they purchased the copyright in the *Encyclopædia*, from *B. Fellowes*, the then proprietor of it, upon the distinct understanding that the copyright of all the articles in it was vested in him, subject only, as to some of such articles, to the right of separate publication reserved to the authors thereof; and that the names of those authors were inserted in the assignment by which the purchase was completed, but the Plaintiff's name was not mentioned therein; and that an entry of the assignment was afterwards made in the Book of Registry kept, for that purpose, at *Stationers' Hall*.

1848.

THE BISHOP OF HEREFORD v. GRIFFIN.

Mr. *Rolt* and Mr. *Calvert*, now moved to dissolve the injunction.

The Plaintiff sent his essay to Messrs. *Baldwin* and *Cradock*, without reserving any portion of the copyright in it to himself; and they paid him the full price for it; therefore, they became, in equity at least, the absolute owners of the copyright. The Plaintiff has not even averred any title in himself: all that he says with respect to the contract between himself and Messrs. *Baldwin* and *Cradock*, is that he agreed to compose the essay for the purpose of its being published in the *Encyclopædia*. He adds indeed that he *did not agree* that it should be published in any other manner. But that is not sufficient: for the understanding between the composers of articles for and the publishers of *Encyclopædias*, and the custom of the trade is that, unless there is some special agreement to the contrary, the copyright in the articles belongs to the publishers *for all purposes*. Therefore, Messrs. *Baldwin* and *Cradock* might have published the Plaintiff's essay as a distinct work; and, as all the rights which they had, are now vested in the Defendants, the Defendants would have been entitled to publish the essay in the same form, even if the law of copyright had remained as it was in the year 1833.

That right, however, is placed beyond dispute by the recent Act to amend the Law of Copyright (5th and 6th Vict. c. 45): the eighteenth section of which is as follows: "And be it enacted that when any publisher or other person shall, before or at the time of the passing of this Act, have projected, conducted and carried on, or shall, hereafter, project, conduct and carry on, or be the proprietor of any *Encyclopædia*, review, magazine, periodical work or work published in a series of books or

1848.

THE BISHOP OF HEREFORD v. GRIFFIN.

parts, or any book whatsoever, and shall have employed or shall employ any persons to compose the same, or any volumes, parts, essays, articles or portions thereof, for publication in or as part of the same, and such work, volumes, parts, essays, articles or portions, shall have been or shall hereafter be composed under such employment, on the terms that the copyright therein shall belong to such proprietor, projector, publisher or conductor, and paid for by such proprietor, projector, publisher or conductor, the copyright in every such *Encyclopædia*, review, magazine, periodical work, and work published in a series of books and parts, and in every volume, part, essay, article and portion so composed and paid for, shall be the property of such proprietor, projector, publisher or other conductor, who *shall enjoy the same rights as if he were the actual author thereof*, and shall have such term of copyright therein as is given to the authors of books by this Act, except only that, in the case of essays, articles or portions forming part of and first published in reviews, magazines or other periodical works of a like nature, after the term of twenty-eight years from the first publication thereof respectively, the right of publishing the same in a separate form, shall revert to the author for the remainder of the term given by this Act: Provided always that, during the term of twenty-eight years, the said proprietor, projector, publisher or conductor shall not publish any such essay, article or portion, separately or singly, without the consent, previously obtained of the author thereof or his assigns: Provided also that nothing herein contained shall alter or affect the right of any person, who shall have been or who shall be so employed as aforesaid, to publish any such his composition in a separate form, who, by any contract express or implied, may have reserved or may hereafter

1848.

THE BISHOP OF HEREFORD v. GRIFFIN.

reserve, to himself, such right; but every author reserving, retaining or having such right, shall be entitled to the copyright in such composition, when published in a separate form, according to this Act, without prejudice to the right of such proprietor, projector, publisher or conductor as aforesaid."

The first observation that we make upon that section, is that the exception in it, applies to essays and articles published in reviews, magazines or other periodical works of a like nature, and not to *Encyclopædias*; and that the proviso which immediately follows, has the same limited application.

The VICE-CHANCELLOR:

I think so: for that part of the section which precedes the exception, mentions *Encyclopædias* as well as reviews and magazines; but the word, "*Encyclopædia*," is omitted in the exception.

Argument resumed.—What then does the Act require, in order to place the proprietors of *Encyclopædias* in the same position as authors of books? It requires, first, that the proprietor shall have employed some person or persons to compose articles for publication in or as part of the *Encyclopædia*: secondly, that the articles shall have been composed under such employment and have been paid for by the proprietor; and, thirdly, that they shall have been composed on the terms that the copyright therein shall belong to the proprietor. Now it is not disputed that the first two requisitions have been complied with in this case; and the only question is as to the third. With respect to that, we submit that, as the Plaintiff does not allege that he made any stipulation as to the copyright in his essay, either when

1848.

THE BISHOP OF HEREFORD v. GRIFFIN.

he agreed to write it for *Baldwin* and *Cradock*, or when he sent it to them; and, as he afterwards received the full price for it, the necessary conclusion, both at law and in equity, is that he composed it on the terms that the entire copyright in it should belong to *Baldwin* and *Cradock*, the then proprietors of the *Encyclopædia*. Besides which, the Defendants state in their answer, as positively as persons who were not parties to the contract could do, that the essay was composed upon those terms: therefore, there can be no doubt as to the Defendants' right to publish it in a separate form. But, if there were any doubt as to their right, the Court would not restrain them from exercising it: *Stevens* v. *Keating* (*a*), *The Attorney-General* v. *The Mayor of Liverpool* (*b*).

Mr. Serjeant *Talfourd*, Mr. *Bethell* and Mr. *Fleming*, for the Plaintiff, said that the proposal which *Baldwin* and *Cradock* made to the Plaintiff, was to write an article or essay, on the life of *Thomas Aquinas*, for the purpose of its being inserted in a particular work; and that the Plaintiff wrote the article and sent it, to *Baldwin* and *Cradock*, for that and for no other purpose; that, before the recent Act of Parliament, copyright could not pass except by an assignment in writing; and, therefore, the Plaintiff, when he sent the manuscript to *Baldwin* and *Cradock*, did not vest the copyright in them, but, merely, gave them licence to use it for a particular purpose: that the recent Act of Parliament was intended not to alter the rights of authors and publishers *inter se*, but only to enable the publishers and proprietors of Encyclopædias, magazines, &c., to protect the articles, comprised in those works, from being pirated by strangers,

(*a*) 2 Phill. 333. (*b*) 1 Myl. & Cr. 171.

1848.

THE BISHOP OF HEREFORD v. GRIFFIN.

without proving a legal assignment of the copyright in the articles.

Mr. *Rolt* replied, and concluded by asking that the question between the parties might be determined by a trial at law.

The VICE-CHANCELLOR:

My opinion, in this case, is that there is nothing to try at law. Because the Plaintiff was the original composer of the article; and, thereby, he had the copyright in it, entirely, except so far as he parted with it. He represents, in his affidavit, that he was applied to to write it and that he wrote it for publication in the *Encyclopædia*. He certainly represents that he did not give any additional right beyond the mere right to publish the article in the *Encyclopædia*.

The Defendants, for some reason or other, have stated their case, in their answer, in a manner perfectly novel. Instead of adopting the words of the eighteenth section of the recent Act for the amendment of the law of copyright, and stating that they believe that Messrs. *Baldwin* and *Cradock* employed the Plaintiff to write the article on the terms that the copyright therein should belong to them, and that it was paid for accordingly; they say they believe it to be true that the Plaintiff, in or about the year 1833, composed or wrote an article or essay on the life of *Thomas Aquinas*, and forwarded it to Messrs. *Baldwin* and *Cradock*, and that Messrs. *Baldwin* and *Cradock*, in the year 1835, paid the Plaintiff, at the rate of seven guineas per sheet, for it; that the payment so made, to the Plaintiff, was made at the usual rate at which payment was made to the authors of articles for the *Encyclopædia*; and that all such articles

1848.

THE BISHOP OF HEREFORD v. GRIFFIN.

were, as the Defendants believe, uniformly composed upon the terms that the copyright in the same, for all purposes, should belong, exclusively, to the publishers and proprietors of the *Encyclopædia*, save and except in those instances in which special agreements were made for the reservation, to such authors, of liberty to publish their respective articles in a separate form. Now what is stated by the statute, is that, if the proprietors of an *Encyclopædia* shall have employed any persons to compose articles for publication in that work, and the articles shall have been composed, under that employment, on certain terms, then such and such rights shall result, provided there be a payment.

Then the Defendants say that they believe that the ordinary terms of contract were adopted between the Plaintiff and the publishers of the *Encyclopædia*, and that no special agreement was entered into with respect to the reservation of any right of publication by the Plaintiff. But it must be observed that, according to the law, the copyright was in the Plaintiff except so far as he parted with it; therefore no reservation was necessary to constitute a right in him. And, when they say that, in the absence of any special agreement to the contrary, articles contributed to *Encyclopædias* are, according to the custom prevalent in the trade and amongst authors, always understood to be contributed on the terms that the copyright shall belong to the publishers of such *Encyclopædia*, for all purposes, it appears to me that they do not meet the Plaintiff's case. Instead of saying, simply, that they believed that the contract was that the Plaintiff should write the article in question for Messrs. *Baldwin* and *Cradock*, and that he should be paid for it on the terms that the copyright in it should belong to Messrs. *Baldwin* and *Cradock*, they

1848.

THE BISHOP OF HEREFORD *v.* GRIFFIN.

use this circumlocutory language which purposely avoids stating that which alone would have any weight if it had been stated. And then, under this roundabout form of representing what were the ordinary terms, save and except where there were exceptions, and so managing the statement of the case that, as I think, it would be impossible to try an issue as the words of this answer stand, I am asked to say that the plain language of the Plaintiff's affidavit is displaced. But my opinion is that it remains as it did before, and that there is nothing in the answer which at all controverts the Plaintiff's case.

Motion refused with costs.

1848: 14th, 15th, and 18th April.

Appointment. Power. Will.

PRICE *v.* PARKER.

BY an indenture dated the 12th of September 1842, it was declared that *T. Parker* and *John Spratt* should stand possessed of certain sums of stock which had been recently transferred into their names, in trust for such person or persons, for such intents and purposes, and, generally, in such manner and form as *George Price* and

Stock was transferred to trustees in trust for such persons as *A.* and his wife should jointly appoint; and, in default of appointment, in trust, during their joint lives for the separate use of the wife; and in case *A.* should die first, in trust for his wife absolutely; but if she should die first, in trust for him for life, and, subject thereto, in trust for such persons as his wife, notwithstanding her coverture, should, by will, appoint, and, in default of such appointment, in trust for her next of kin.

The wife, *in A.'s lifetime*, made a will in exercise of the last-mentioned power. *A.* died before her. On her death, her will was admitted to probate, but the probate was limited to the property which she *had power* to dispose of.

Held that the will was inoperative.

Trimmell v Fell 16 Beav. 542.
Cave v Cave 8 D. M. & G. 132.
Thomas v Jones 2 J. & H. 478. [illegible] 63
Noble v Phelps 2 P & D 282
[illegible]

1848.

PRICE v. PARKER.

Elizabeth his wife, should, at any time or times during their joint lives, by any deed or deeds to be, by both of them, sealed and delivered in the presence of one or more witnesses, jointly appoint, and, in default of such appointment, in trust to pay the dividends to *Elizabeth Price*, during the joint lives of herself and her husband, for her separate use: and, in case her husband should die in her lifetime, in trust to transfer the capital to her, her executors, administrators, or assigns: but, in case she should die in his lifetime, in trust to pay the dividends to him during his life; and, subject thereto, to stand possessed of the capital, in trust for such person or persons, as his wife, notwithstanding her coverture, should, by her will (which she was thereby authorized to make) appoint, give or bequeath the same; and, in default of such appointment, gift or bequest, in trust to stand possessed thereof for her next of kin according to the Statutes of Distribution.

George Price died on the 4th of May 1846. *Elizabeth Price* died on the 27th of the same month. No joint appointment was made by them in pursuance of the power for that purpose contained in the settlement: but, in October 1843, *Elizabeth Price* made a will, by which, after reciting the settlement, she, in exercise of the power thereby given to her and of all other powers enabling her in that behalf, appointed, gave and bequeathed the stock to trustees in trust for the Defendants.

In January 1847 her will was proved by one of the executors therein named; to whom administration was granted, limited so far as concerned all *the right, title and interest* of the deceased, in and to all such personal estate and effects as she, by virtue of a certain indenture

1848.

PRICE v. PARKER.

of settlement, dated the 12th day of September 1842, had a right to appoint or dispose of, and had, in and by her said will, appointed and disposed of accordingly, but no further or otherwise.

The bill was filed by Mrs. *Price's* sole next of kin, insisting that her will was wholly inoperative as to the trust funds, and that the same was not a valid execution of any power vested in her; and praying that the Plaintiff might be declared entitled to the funds.

Mr. *K. Parker*, for the Plaintiff, said that the instrument which had been proved in the Ecclesiastical Court, was made by Mrs. *Price*, in exercise of the power given to her by the settlement; but that power was given to her in the event only of her dying in her husband's lifetime; and, as that event did not happen, the power never arose, and, consequently, the instrument was wholly inoperative.

Mr. *Bacon* and Mr. *Lewis*, for parties claiming under the instrument, said that, under the settlement, Mrs. *Price* had power to dispose of the trust funds in case she died in her husband's lifetime, and that the funds were vested in her absolutely, in case she survived her husband; therefore, the effect of the settlement was to give her the same dominion over the funds, (which were originally her own property,) as she would have had if she had been a single woman. They cited *Morwan* v. *Thompson* (*a*), *Clough* v. *Clough* (*b*), *Cross* v. *Hudson* (*c*), *Sugden* on Powers (*d*), and the 24th section of

(*a*) 3 Haggard, 239.
(*b*) 3 Myl. & Keen, 296.
(*c*) 3 Bro. C. C. 30.
(*d*) Sixth edition, 443, pl. 17.

the Act for the Amendment of the Laws with respect to Wills (*e*).

Mr. *Rolt*, Mr. *F. Hall*, Mr. *Welford*, Mr. *Dickinson*, and Mr. *Erskine* appeared for other parties. They argued the case before his Honour in his private room.

The VICE-CHANCELLOR.

By a deed of settlement, dated the 12th of September 1842, certain personal property was vested in trustees, in trust for such persons as *George Price* and *Elizabeth* his wife should jointly appoint, and, in default of appointment, in trust for the separate use of the wife for life; and, if the husband died in the lifetime of the wife, then in trust for her; but, if she died first, then as she should appoint by her will. During the coverture, she made a will purporting to be an execution of the power. Then her husband died and she became the survivor. Upon her death, letters of administration with the will annexed, were granted in a particular form. The question is whether, adverting to the mode in which the administration was granted, the will made during the coverture, operated. No question as to the construction of the power, arises in this case. The only question is on the effect of the probate, which is in this form:—"Proved at *London*, this 5th day of January 1847, before the Judge, by the oath of *William Rodham*, one of the executors, to whom administration is granted, limited so far as concerns all the right, title and interest of her, the said deceased, in

(*e*) 7 Will. IV. & 1 Vict. c. 26. That section enacts that every will shall be construed, with respect to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intent shall appear by the will.

1848.

PRICE v. PARKER.

and to all such personal estate and effects as she, the said deceased, by virtue of a certain indenture of settlement, dated the 12th day of September 1842, had a right to appoint or dispose of, and hath, in and by her said will, appointed and disposed of accordingly." Now it is as plain to me as words can make it, that this is not enough to give effect to a will disposing of property which the testatrix was entitled to; but that it was meant to operate only in the event of her having a power to execute, and which she had actually executed. The Ecclesiastical Court had no authority to grant probate of the will to operate as a will only, independently of the power; for it was executed by a lady during her coverture; and, if it was void at first, nothing could make it good, except a republication of it after the coverture had determined. This is attempted to be got rid of by saying that, by the 24th section of the Act of 7 Will. IV. and 1 Vict. c. 26, every will is to be construed to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will. The effect, however, of that is not to make that valid which was invalid in its inception; but to give a rule for the construction of a valid testamentary instrument.

The event which happened, left no power in the lady for execution, but left the property in her. Therefore the persons who are named in the instrument which was made during the coverture of the lady, take nothing under it.*

* "Formerly the Ecclesiastical Courts did not take upon themselves to enter, with any great minuteness, into the construction of the powers under which wills made by married women were executed, or as to the due compliance with their

DAWSON *v.* PILLING.

1848:
18th April.

Ejectment—bill. Plea and Pleading.

Plea to an ejectment-bill, that the Defendant was seised in fee, and that there were no outstanding terms, no mortgages or incumbrances, and no unexpired leases:

Held not to be bad on the ground of duplicity.

THE bill stated that *James Draper* deceased, was, on and previously to the 27th of July 1809, seised and possessed of and entitled to the fee simple and inheritance of and in the messuages in the indentures of lease and release thereinafter stated particularly described, the same having been purchased by him and duly conveyed to him, his heirs and assigns: that, by indentures of lease and release dated the 26th and 27th of July 1809, and made between *Draper* of the one part, and *John Norris*, since deceased, and the Plaintiffs of the other part, *Draper*, in consideration of the love and affection which he had for his wife, *Esther*, and his children, and

---

conditions. But it is now established that the Court of Probate is bound to decide, in the first instance, whether the power has been duly executed, before it gives the instrument the sanction of its seal. Yet, if the Court feel any real doubt on the point, it seems the safer course to admit the paper to probate: inasmuch as the production of such a probate will not, alone, be sufficient to induce a Court of Equity to act upon it; for, with respect to other special circumstances which may be required to give the instrument effect as a valid appointment, viz., attestation, sealing, &c., the Temporal Courts have never been contented with the judgment of the Spiritual Court. Whilst, on the other hand, if the Court of Probate should reject the paper, its decision would be final; as the Court of Construction will not proceed to the consideration of the effect of any testamentary paper, till it has been proved in the proper Ecclesiastical Court." 1 Williams on Executors, 3rd edit. page 46. See *Gawler* v. *Standerwick*, 2 Cox, 15; and *Cole* v. *Scott*, *post*.

1848.

DAWSON v. PILLING.

towards making a provision for them and their issue, conveyed the messuages to *Norris* and the Plaintiffs, their heirs and assigns; to hold the same to them, their heirs and assigns, to, for and upon the several uses, intents and purposes, and under the limitations thereinafter expressed and declared concerning the same, being uses and trusts for the benefit of his wife, children and other issue; that the indentures were duly executed, by *Draper*, on the 27th of July 1809, and were, thereupon, delivered to *Norris* and the Plaintiffs, and the same continued in their possession down to the time of *Norris's* death, and the same, ever since his decease, had been in the possession of the Plaintiffs; that, although the indentures were not executed by *Norris* and the Plaintiffs, yet they accepted the trusts reposed in them thereby, and, immediately after the execution of the release, *Norris*, on behalf of himself and the Plaintiffs, as the trustees under the release, entered into the receipt of the rents and profits of the messuages; and *Norris*, on behalf of himself and the Plaintiffs as such trustees as aforesaid, continued in the possession or receipt of the rents and profits down to the time of his death; that he died in June 1840; that, upon his death, the Plaintiffs became and they still were, as the surviving trustees of the indentures, entitled to the possession of the messuages; but that, shortly after *Norris's* death, the Defendants entered into the possession or into the receipt of the rents and profits of the messuages, and had ever since continued and still were in such possession or receipt, although they never had, nor had either of them any title whatever to the messuages or any part thereof; and they got into their possession several of the title deeds relating thereto, and had, ever since, retained the same; that the Plaintiffs intended, forthwith, to cause an action of ejectment to be com-

menced, in one of the courts of law at *Westminster*, for the recovery of the possession of the messuages; that, at the time of *Norris's* death, there were and there still were subsisting some terms for years in the messuages or some part thereof, which had long since been satisfied, and which remained outstanding; and also certain mortgages of and incumbrances upon the messuages, for small sums of money; and also certain leases thereof which were not yet expired; that some of such satisfied terms and leases had become and were then vested in the Defendants, or in one of them, or in some person or persons in trust for them or one of them; and some of such mortgages or incumbrances were then vested in the Defendants or one of them, by virtue of some assignments or assignment which they or one of them had procured to be executed to them or one of them; and that others of such satisfied terms, leases, mortgages and incumbrances remained vested in some persons or or person other than the Defendants; and that the Defendants threatened and intended to set up such outstanding terms, mortgages, incumbrances and leases, or some or one of them, in bar to the ejectment, and to any other action or proceeding at law which the Plaintiffs might, thereafter, commence for the recovery of the messuages; and, under the circumstances stated, the Plaintiffs were unable to recover possession of the messuages at law: that *there was very little*, if anything, *then due upon the mortgages or incumbrances* which the Defendants had procured to be assigned to them as thereinbefore mentioned; *and whatever, if anything, was ever so due, had been long since paid and satisfied* by means of the monies which the Defendants had received in respect of the rents and profits of the messuages,* and

* The latter part of this statement seems to be inconsistent with the former.

1848.

DAWSON v. PILLING.

a considerable sum was then due, to the Plaintiffs as the surviving trustees of the indenture of release, in respect of such rents and profits. The bill charged that the Defendants had had divers conversations with each other and with other persons, and had written and sent, to each other and to other persons, divers letters wherein they, or one of them, had admitted the matters stated and charged in the bill to be true; and that they had then or lately had, in their possession, divers deeds, papers and writings relating to such matters or some of them, and which, if produced, would lead to the discovery or elucidation of the truth in the premises; and that they ought to set forth a list thereof. The bill prayed that it might be declared that the Plaintiffs were, as the surviving trustees of the indentures of lease and release, entitled to the messuages therein comprised; or that some issue or issues might be tried, under the direction of the Court, for the purpose of trying the right and title of the Plaintiffs, as such surviving trustees, to the messuages; or that the Plaintiffs might be at liberty to try, their right and title to the same, by ejectment; and, if it should appear that the Defendants, or either of them, were or was entitled to any mortgages or incumbrances, or mortgage or incumbrance affecting the messuages or any part thereof, then that the Plaintiffs might be at liberty to redeem the same, and that all necessary accounts might be taken and inquiries made for that purpose; and that an account might be taken of all sums of money which had been received, by the Defendants or either of them, in respect of the rents and profits of the messuages or any part thereof; and that the Defendants might be decreed to pay, to the Plaintiffs, as such surviving trustees as aforesaid, what, if anything, should, upon taking the accounts thereby prayed, be found to be due from them in respect of such rents and profits, the

Plaintiffs being ready and willing to pay, to the Defendants, what, if anything, should be found due to them; and that the Defendants might be decreed to execute, or procure to be executed, to the Plaintiffs, as such surviving trustees as aforesaid, proper conveyances and assignments of any legal estate or term or terms of years in the messuages, which might be vested in the Defendants or in either of them, or in any persons or person in trust for them or either of them; and to deliver up, to the Plaintiffs, the possession of the messuages, together with all deeds, evidences and writings in the possession or power of the Defendants or either of them, in any manner relating to the messuages; and that the Defendants might be restrained, by the injunction of the Court, from setting up any outstanding terms or term or legal estate in the messuages or any of them or any part or parts thereof, at the trial of any issue or issues to be directed, by the Court, for trying the right of the Plaintiffs to the messuages, or of the action of ejectment which was about to be commenced as aforesaid, or of any other action or actions of ejectment which might thereafter be commenced or brought, by the Plaintiffs, against the Defendants or either of them, for the recovery of the possession of the messuages or any of them.

One of the Defendants put in the following plea to the bill:

"This Defendant, by protestation, &c., says that this Defendant was, at the time of the alleged death of *John Norris* in the said bill named, and now is seised, in his demesne as of fee, of and in all the messuages, hereditaments and premises in the said bill mentioned, and concerning which the said bill is exhibited in this honourable Court, and that there were not, at the time of the said alleged death of the said *John Norris*, nor are there

1848.

DAWSON v. PILLING.

still or now subsisting any terms for years of or in the said messuages, hereditaments and premises, or any part thereof, which have long since, or at any time, been satisfied, and which remain outstanding; and that there were not, at the time of the said alleged death of the said *John Norris*, nor are there still or now subsisting any mortgages of or incumbrances upon the said messuages, hereditaments and premises, or any part thereof, for small or any sums of money or at all, and that there were not, at the time of the said alleged death of the said *John Norris*, subsisting any leases of the said messuages, hereditaments and premises, or of any part thereof, which are not yet expired. All which matters and things this Defendant doth aver to be true, and pleads the same to the whole of the said bill."

Mr. *Bethell* and Mr. *Beales*, in support of the plea, said, first, that the bill was an ejectment bill, and that it stated no impediment to the Plaintiffs trying their right at law, except what the plea negatived: *Armitage* v. *Wadsworth* (*a*): secondly, that the bill charged, merely, that the Defendants had, in their possession, deeds and other writings relating to the matters contained in the bill, but did not show that they were, in any way, necessary to enable the Plaintiffs to recover at law; and, therefore, it was not necessary for the Defendant to answer that charge: *Jones* v. *Jones* (*b*), *Crow* v. *Tyrrell* (*c*).

Mr. *Stuart* and Mr. *Bilton*, in support of the bill, said that a plea of more than one matter, was bad for duplicity; and that the plea, in the present case, pleaded four distinct facts: first, that the Defendant was seised

(*a*) 1 Madd. 189. (*b*) 3 Mer. 161.
(*c*) 3 Madd. 179.

in fee: secondly, that there were no outstanding satisfied terms: thirdly, that there were no mortgages or other incumbrances: and, fourthly, that there were no unexpired leases. That another fatal objection to the plea, was that it was not accompanied by an answer denying the passages in the bill which tended to disprove it, and, particularly, the charge that the Defendants had, in their possession, deeds and other documents relating to the matters alleged by the bill, and which, if produced, would lead to the discovery or elucidation of the truth in the premises: *Clayton* v. *Lord Winchelsea* (*d*), *Chadwick* v. *Broadwood* (*e*), *Harris* v. *Harris* (*f*).

The VICE-CHANCELLOR:

In my opinion the plea is a perfectly good one. It is, in effect, nothing more than a plea that the Defendant is solely seised in fee; for it is only part of a complete seisin in fee that there is no outstanding legal estate.

Then, with respect to the charge that the Defendant has, in his possession, deeds and other documents relating to the matters alleged by the bill, and which, if produced, would lead to the discovery or elucidation of the premises: it is true, that there is no answer as to that; nor is it necessary; for the Plaintiffs, *on their own showing*, have no title at all;* and it is not necessary to produce documents in order to show that they have no title.

(*d*) 3 Youn. & Coll. Exchequer Cases, 426.
(*e*) 3 Beav. 308 and 530.
(*f*) 3 Hare, 450.

* It will be seen, on referring to the statement of the case, that the bill stated that the messuages were conveyed to *Norris* and the Plaintiffs, and not unto *and to the use* of them.

1848:
29th April;
1st, 2nd, 3rd,
6th, 8th, 9th,
10th, 29th, 30th,
and 31st May;
and 7th June.

Charity.
Dissenters.
Deed.
Construction.

THE ATTORNEY-GENERAL *v.* WILSON.

THIS suit was supplemental, in its nature, to the *Attorney-General* v. *Shore* (*a*).

(*a*) *Ante*, Vol. XI. page 592. See also *Shore* v. *Wilson*, 9 Cl. & Fin. 355.

In 1704, Lady *Hewley*, an *English* Protestant Nonconformist, conveyed estates in *England*, to trustees (all of whom appeared to be resident in *England*, and some of whom at least were Protestant Nonconformists,) in trust, for such poor and godly preachers for the time being of *Christ's* Holy Gospel, and of such poor and godly widows for the time being of such preachers, as the trustees for the time being should think fit; for promoting the preaching of *Christ's* Holy Gospel in such manner and in such poor places as the trustees for the time being should think fit; for educating such young men designed for the ministry of *Christ's* Holy Gospel as the trustees for the time being should think fit; and for relieving such godly persons in distress, being fit objects of her own and the trustees' charity, as the trustees for the time being should think fit: and she directed that the trustees for the time being, should, in their dispositions and distributions of the aforesaid charities, have a primary respect to such objects thereof as aforesaid as were then or should afterwards be in *York*, *Yorkshire* or other northern counties in *England*, not excluding those in other places and counties, as the trustees for the time being, from time to time, should think fit. Held, by the *Vice-Chancellor*, that orthodox, *English* dissenting ministers and members of congregations, essentially and substantially, in doctrine and discipline, of the same sort as the orthodox dissenting congregations which existed in *England*, in 1704, and, therefore, that orthodox, *English* dissenting ministers and members of Baptist, Independent or Congregational, and Presbyterian congregations in *England*, *which were not in connexion with or under the jurisdiction of either the Kirk or the Secession-church of Scotland*, were alone entitled to participate in the benefits of the charity; and that such of the trustees as were members of Presbyterian congregations in *England* which were in connexion with the Kirk, or with the Secession-church, ought to be removed.

The last-mentioned trustees appealed from his Honour's decree; and, after the appeal had been opened, but before the argument was concluded, a decree was drawn up, at the request of the Defendants and with the approbation of the *Attorney-General* and the sanction of the *Lord Chancellor*, in terms which admitted the ministers and members of Presbyterian congregations in *England* in connexion with the Kirk and the Secession-church of *Scotland*, to participate in the administration and benefits of the charity.

1848.

THE ATT.-GENERAL v. WILSON.

The information in it was filed, at the relation of the surviving relators in that suit, (all of whom were Independents,) against the trustees and sub-trustees or managers of the charity-estates, appointed in that suit, six of whom, namely, *Wilson*, *Clapham*, *Hodgson*, *Parsons*, *Pritchett* and *Bowden*, were Independents; four, namely, *Lonsdale*, *Barbour*, *Ralph* and *Thomson* were Presbyterians in connexion with the Kirk, and the others, namely, *Finlay*, *Ross*, *Fair* and *Pringle*, were Presbyterians in connexion with the Secession-church of *Scotland*.

The information, after setting forth the information, decree, and other proceedings in the original suit, alleged as follows: That Lady *Hewley* was an *English* orthodox dissenter from the Established Church of *England*, and that she intended that *English* orthodox dissenters only should receive the benefits of her charities: that, when she executed the deeds of January 1704 and April 1707, there were only three sects of *English* orthodox dissenters, namely: Independents or Congregationalists, Presbyterians, and Baptists: that the Presbyterians differed materially from the Presbyterians of the Church of *Scotland* as then and now in existence, and that their doctrines and practice were the same as those of the present Independents: that many of the orthodox English Presbyterians who existed at the beginning of the eighteenth century, afterwards disused the name "Presbyterian," and assumed that of Independents or Congregationalists; and that the Independents of the present day are the representatives, to a great extent, of the old orthodox *English* Presbyterians as well as of the old Independents or Congregationalists; and that the remnant of the old Presbyterians became Unitarians, but retained the name of Presbyterians; and that all other

1848.

THE ATT.-GENERAL v. WILSON.

persons in *England* calling themselves Presbyterians, are members either of the Kirk or of the Secession-church of *Scotland*, and differ, materially, from the opinions and religious practice or discipline of the *English* Presbyterians in the early part of the eighteenth century, and, in particular, from the opinions and religious practice of Lady *Hewley*; and that the ministers of *Scotch* Presbyterian congregations in *England* and *Wales*, of both the aforesaid churches, are *Scotchmen*, who have been ordained and educated in *Scotland*: that the *Scotch* Presbyterian chapels in *England* and *Wales* were built many years after the death of Lady *Hewley*, and are connected or in communion with Presbyteries in *Scotland*: that the *Scotch* Presbyterians have only one chapel in *Yorkshire*, which was built in 1790; and that, prior to that year, they had no chapel in *Lancashire*; that, until very recently, they had no chapel in *Westmoreland*; and now they have only one, which was built a few years ago: that divers of the *Scotch* Presbyterian congregations in *England* and *Wales* have been represented in synods or assemblies in *Scotland*; and the trust deeds of all or the greater part of their chapels require that none but licentiates or ministers of the Kirk, or of the Secession-church of *Scotland*, or ministers belonging to and in full communion with one or other of those churches shall be ministers of such chapels; and all, or nearly all the present and former ministers of such chapels, have been educated in *Scotland*, and licensed to preach either by the Kirk or by the Secession-church of *Scotland*, and such education and licensing are necessary to qualify them to be the ministers of such chapels; and many of such ministers have, as members of the Kirk or of the Secession-church of *Scotland*, received appointments and translations in one or other of such churches: that the before-mentioned trust-deeds further require

1848.

THE ATT.-GENERAL v. WILSON.

that such chapels shall be used for the purposes of divine worship and in connexion with and according to the rites, forms and usages either of the Kirk or of the Secession-church of *Scotland*; and that no variation shall be made in the trusts by which such chapels are connected with and solely appropriated to the use of congregations belonging to one or other of those churches, or by which the worship in them is appointed to be observed according to the rites, usages, doctrines and tenets of one or other of them, and by a minister belonging to and in full communion with one or other of them: that, in many instances, the Kirk and the Secession-church of *Scotland* have exercised control or authority over ministers, presbyteries, congregations and chapels in *England* and *Wales* connected or in communion with them: that there is not a single college, in *England* or *Wales*, belonging to or connected with Presbyterians belonging to either of the said *Scotch* churches; and that the only colleges in *England* and *Wales*, under the name of Presbyterian, are Unitarian; and, by reason thereof, the exhibitions given by Lady *Hewley* cannot be applied to any existing Presbyterian colleges in *England* or *Wales*; but there are ten colleges in *England*, belonging to the Independents or Congregationalists, for educating young men designed for the ministry of *Christ's* Holy Gospel, and three of them are in the Northern Counties of *England*; and there are also three colleges belonging to the Baptists, for the like purpose, one of which is in the county of *York*; and that many young men designed for the ministry of *Christ's* Holy Gospel, and attending those colleges, are in poor circumstances, and are proper objects of Lady *Hewley's* charity. The information further stated that the Defendants, *Ralph* and *Thomson*, had obtained preferment in *Scotland*, under the Kirk, and had gone to

1848.

THE ATT.-GENERAL v. WILSON.

reside there; and that the Defendant *Fair* had become a member of the Church of *England;* and that it was necessary that a scheme should be settled for the due management and administration of the charity, *and for the purpose of determining who were the proper objects of the benefits of it.* The information prayed that the *Attorney-General* might have the benefit of the original suit and information, against the Defendants to the present suit, and the same relief touching the charity as if those Defendants had been parties to the original information, and that it might be referred to the Master to whom the original suit was referred, to settle a proper scheme for the future management and regulation of the charity, *and for the selection of proper objects to participate in the various branches thereof,* and for the appropriation or division of the charity funds and income to and among such branches or objects, having regard to the relative numbers of such objects, and to the districts to which a preference was given by the endowment; and, also, a scheme for the due appointment and succession of trustees and sub-trustees or managers of the charity on any future vacancy, having regard, in the selection of them, to the classes of persons who were the proper objects of the charity; and that the Court would make such declarations, for the guidance of the *Master* in settling the scheme, as should be necessary; and that the *Master* might be directed to approve of proper persons to be sub-trustees in the place of *Ralph*, *Thomson* and *Fair*.

At the hearing of the Cause, the question was whether Independents and other orthodox *English* dissenters, were the sole objects of Lady *Hewley's* charities, or whether members of congregations in *England*, some of which were in connexion with the Kirk, and others with

the Secession-church of *Scotland*, were also objects of those charities.

Mr. *Bethell*, Mr. *Bacon* and Mr. *Chandless* appeared for the Relators (all of whom were Independents), and

Mr. *Stuart* and Mr. *Rolt* for the Defendants who were of the same sect.

Mr. *Swanston*, Mr. *Malins* and Mr. *Borton* appeared for the Defendants who were members of congregations in connexion with the Kirk; and

Mr. *James Parker* and Mr. *Lloyd*, for the rest of the Defendants, who were members of congregations in connexion with the Secession-church of *Scotland*.

The VICE-CHANCELLOR:

When I first addressed myself to the consideration of the question which is now before me, I was very much struck with this: that the deed of 1704 shows, upon the face of it, that, if ever there was an *English* transaction, the transaction that was completed by that deed, bore that character: for it appears, by it, that Lady *Hewley* was, herself, an Englishwoman, that she had married an Englishman, that all the property which she disposed of was situate in *England*, and that all the trustees were Englishmen; and, it has been unquestionably proved that some of them entertained the same religious sentiments as she did. I allude, particularly, to Mr. *Stretton* and Dr. *Coulton*: and there has been some evidence given as to one or two others; but I do not lay much stress upon it: with respect to Mr. *Stretton* and Dr. *Coulton* there is no doubt.

Then the first material words, in the deed of 1704,

1848.

THE ATT.-GENERAL v. WILSON.

are: "To such and so many poor and Godly preachers for the time being of *Christ's* Holy Gospel:" and the question mainly depends upon this: Who were the persons that Lady *Hewley* has described by those words? Now I cannot but think that, in construing the deed of 1704, we must, of necessity, take into consideration the deed of 1707: for, some of the learned Judges who delivered their opinions to the House of Lords, considered that the disposition made by the deed of 1704 and the foundation of the Hospital, as well as the subsequent dispositions of the deed of 1707, all made part of one transaction: and I think that that is the fair and the true, legal view of the matter. Not that it would much signify if it were otherwise; but it is impossible not to see that all the charities are blended together. The deed of 1707 has precisely the same parties to it as the deed of 1704 has. Their names, too, are placed in the same order, and the words in the deed of 1707, by which the residuary rents are disposed of, are identically the same as those which are used in the deed of 1704. Moreover, it is to be observed that Lady *Hewley* appointed Dr. *Coulton* to be one of the managers of the Hospital founded by the deed of 1707; and that all the other managers were persons resident in or near *York*. She died in September 1710; and it appears, from the sermon which was preached, by Dr. *Coulton*, at her funeral, that she was in the habit of attending the chapel of which he was the officiating minister. Therefore, her opinions on religious matters must have borne a very close resemblance, at least, to his.

Then, Lady *Hewley* having used those general terms to which I have adverted, we have to inquire what those terms mean. Now it has struck me, all along, that, in a very great degree although not in terms, that question has been already decided: because it has been decided that

1848.

THE ATT.-GENERAL v. WILSON.

no unorthodox dissenter, nor any member of the Church of *England*, is to have any thing to do with the administration of the trusts created by the deeds of 1704 and 1707, or to take any benefit under them. Then, if you remove the unorthodox dissenter and reject the Church of *England* man, the necessary consequence is that you must adopt the orthodox dissenters. Mr. Baron *Gurney* gave a very plain and clear opinion upon that subject: and that opinion was referred to, with approbation, by the *Lord Chancellor*, when he moved the judgment of the House of Lords.

The question raised by the supplemental information, is whether those who are members of the Kirk, or of the Secession-church of *Scotland*, come within the description of poor and Godly preachers of *Christ's* holy gospel, those words having, to the extent which I have mentioned, already received an exposition. Now it is perfectly manifest from history (I allude to *Neal's* History of the Puritans and *Baxter's* History of his own Life and Times) that though the *Scotch* Presbyterians did predominate to a certain extent, yet they never predominated so far as to have their scheme of church government carried into effect by any law in *England*. *Neal* says: "Although, as the influence of the *Scots* over the two Houses increased, Presbytery prevailed; and, when the Parliament were at their mercy and forced to submit to what conditions they would impose upon them for their assistance, the Kirk discipline gained the ascendant, and, at length, advanced into a divine right in the assembly of divines, yet the Parliament never would come into it: and, when the *Scots* were gone home, it dwindled, by degrees, until it was almost totally eclipsed by the rising of the Independents." Then there is another passage in which the same author says: "The Presbyterians never saw their dear

1848.

THE ATT.-GENERAL v. WILSON.

Presbytery settled in any one part of *England*. *Baxter* says it was settled in *London* and *Lancashire*: it never was settled by law." Then we find that, after the Act of Uniformity, of *Charles* the Second, had passed, there came the Act of Toleration; and that was in the year 1689: and then, after that, we have what was called: "The Happy Union," in 1691; which lasted for about four years; and then the union appears to have been dissolved, but the state of things remained much the same as it was before the year 1691. And I think that it clearly appears, from the evidence that has been given, that, in 1704 and 1707, the words: "Godly preachers of *Christ's* Holy Gospel," or, "Godly preachers" alone, would have been considered, by every person who saw or heard them, to mean those persons who answered the description of orthodox *English* dissenters at that time. The evidence that has been brought against that signification of the words, is very slight indeed. It amounts to this: that, except congregations here and there, which might, more or less, be composed of Scotchmen, and might have had a *Scotch* minister, the body of Presbyterians was *English*, and had *English* ministers.

Besides, Lady *Hewley's English* predilections are manifested by this: that she directs that the trustees and managers should, in their dispositions and distributions of her charities, have a primary respect to such objects thereof as then were or should afterwards be in *York* and *Yorkshire*, or other northern counties in *England*, not excluding those in other counties and places: and there can be no doubt that the latter words, as well as the former, point to *England;* because, though, in *England*, we do use the word, "shire" as well as the word, "county," it appears that the Act which was passed in *Scotland* for the purpose of carrying into

1848.

THE ATT.-GENERAL v. WILSON.

effect the *English* Act of Union, when it prescribes the mode in which members should be chosen, uses, invariably, the word, "shires," or, "stewartries," and never mentions the word "county;" and I never heard that word applied to any divisions of *Scotland*, though it is applied to divisions of *Ireland*. Therefore Lady *Hewley* intended to provide for persons who, with respect to religion, should bear the character of orthodox *English* dissenters, and, with respect to residence, should be found in *England*.

That such was her intention appears, also, from one of the rules which she prescribed for the management of the Hospital. She says: "Let every almsbody be one that can repeat, by heart, the Lord's Prayer, the Creed and Ten Commandments, and Mr. *Edward Bowles's* Catechism." Now *Bowles* was one of the ejected ministers, who were turned out in the year 1662; and it is remarkable that this lady does not direct that the poor men and women in the Hospital, shall be able to repeat either of the catechisms which were the particular characteristics of the *Scotch* Church, but that they shall be able to repeat Mr. *Bowles's* catechism, which, as I understand, was published by him some time after he was ejected. And he was not a *Scotch* minister, but was one of the ejected ministers, who suffered because he thought proper not to submit to the Act of Uniformity.

Then, if the words: "Poor and Godly preachers of *Christ's* Holy Gospel," mean orthodox *English* dissenters, there is no difficulty in determining what other persons Lady *Hewley* intended to be the objects of her bounty: and, therefore, I shall declare that the words: "Godly preachers for the time being of *Christ's* Holy

1848.

THE ATT.-GENERAL v. WILSON.

Gospel," contained in the deeds 1704 and 1707, describe, in general, those who, at the time of Lady *Hewley's* death, were, and those who, thereafter, should be orthodox *English* dissenting ministers of dissenting churches or congregations, essentially and substantially, in doctrine and discipline, of the same sort as the orthodox dissenting churches or congregations which existed in *England*, in the years 1704 and 1707; and, therefore, that orthodox *English* dissenting ministers of Baptist Churches, of Congregational or Independent Churches, and of Presbyterian Churches in *England*, which are not in connexion with or under the jurisdiction of the Kirk of *Scotland* or the Secession-church, are alone entitled to take the benefits provided, by those deeds, for Godly preachers of Christ's Holy Gospel.* Secondly, that the words in the same deeds: "Godly widows," describe the widows of those orthodox *English* dissenting ministers. Thirdly, that the words: "The preaching of *Christ's* Holy Gospel," describe the preaching of such orthodox *English* dissenting ministers. Fourthly, that the words: "The ministry of *Christ's* Holy Gospel," describe the ministry exercised by such orthodox *English* dissenting ministers. Fifthly, that the words: "Godly persons," describe the individual members of such Baptist, Congregational or Independent, or Presbyterian Churches: and, Lastly, that the poor people to be placed in the Hospital, must be poor members of such churches. Refer it to the *Master* to whom the Cause of *The Attorney-General* v. *Shore* stands referred, to carry on the scheme directed by the original decree of the 23rd of December 1833, made in that Cause, having regard to the aforesaid declarations, and to appoint new

* It is difficult to reconcile this declaration with the judgment reported *ante*, Vol. XI. page 603. See particularly pages 613 and 614.

1848.

THE ATT.-GENERAL v. WILSON.

trustees and sub-trustees, or managers, in the places of the Defendants *Lonsdale*, *Barbour*, *Finlay*, *Ross*, *Ralph*, *Thomson*, *Fair* and *Pringle*, who are hereby removed from being such trustees and sub-trustees respectively. Direct the *Master* to settle and approve of such conveyances, transfers and assignments as shall be necessary for vesting the trust-estates and funds in the continuing trustees, namely, the Defendants *Wilson*, *Clapham* and *Hodgson* jointly with the new trustees; and refer it to the *Taxing-Master* in rotation to tax all parties their costs of this suit as between solicitor and client, including therein any charges and expenses properly incurred and not being, properly, costs in the Cause.

1849: 25th Jan.

The Defendants *Lonsdale*, *Barbour*, *Finlay*, *Ross* and *Pringle*, appealed to the *Lord Chancellor*, from the above decree, except so far as it directed *Ralph*, *Thomson* and *Fair* to be removed from being sub-trustees or managers of the charities and new sub-trustees or managers to be appointed in their place; and except so far as it directed the taxation and payment of the costs of the Appellants, and of *Ralph*, *Thomson* and *Fair*.

After the hearing of the appeal had commenced but before it was concluded, the parties came to a compromise.

The terms of the compromise, after they had been stated to and sanctioned by the *Lord Chancellor*, were embodied in a decree, which, *at the request of the defendants and with the approbation of the Attorney-General*, directed the *Vice-Chancellor's* decree to be varied by

1849.

THE ATT.-GENERAL v. WILSON.

omitting so much of it as was appealed against, and inserting as follows: "This Court doth declare, First, that, under the words: 'Poor and Godly preachers of *Christ's* Holy Gospel,' poor and orthodox ministers of dissenting congregations in *England* and *Wales* within the protection of the Act of Toleration (1 William and Mary, c. 18) of any of the three denominations, that is to say, Independent or Congregationalist, Presbyterian and Baptist, are eligible to the benefits of the charity created by the deeds of the 12th and 13th days of January 1704 and the 25th and 26th days of April 1707: Secondly, that the words in the same deeds: 'Godly widows,' describe the widows of the poor and orthodox ministers of the last-mentioned dissenting congregations in *England* and *Wales*: Thirdly, that the words: 'The preaching of *Christ's* Holy Gospel' describe the preaching of the orthodox ministers of the last-mentioned dissenting congregations in *England* and *Wales*: Fourthly, that the words: 'The ministry of *Christ's* Holy Gospel' describe the ministry exercised by the orthodox ministers of the last-mentioned dissenting congregations in *England* and *Wales*: Fifthly, that the words: 'Godly persons' describe the individual members of the last-mentioned dissenting congregations in *England* and *Wales*: And, Lastly, that the poor people to be placed in the Hospital, must be poor members of such last-mentioned dissenting congregations in *England* and *Wales*. And this Court doth order and declare that the trustees and managers for the time being, shall, in their disposition and distribution of the charities, have a primary and chief respect to such objects thereof as aforesaid, as are or shall be in *York*, *Yorkshire* and other northern counties in *England*. And the said Defendants, *John Clapham*, *Thomas Lonsdale* and *James Finlay desiring to be discharged* from the execution of the trusts of the said

1849.

THE ATT.-GENERAL v. WILSON.

charity, let them be removed from being trustees of the said charity; and, *on the proposal of the Defendants, the other trustees of the said charity*, and with the approbation of the *Attorney-General*, and with the consent of all the Defendants, let *F. R. Mills* (being one of the body of dissenters called Independents), *S. M. Peto* (being one of the body of dissenters called Baptists), and *William Hamilton* (being one of the body of dissenters called Presbyterians) be respectively appointed trustees of the said charity in the room of the said Defendants *John Clapham*, *Thomas Lonsdale* and *James Finlay:* and, *on the proposal of the Defendants, the other trustees of the said charity*, and with the approbation of the *Attorney-General*, and with the consent of all the Defendants, let Dr. *Benjamin Goodwin* (being one of the body of dissenters called Baptists) and the Rev. *Richard Hunter* and the Rev. *Hugh Campbell* (being two of the body of dissenters called Presbyterians) be respectively appointed sub-trustees of the said charity in the respective rooms of *Hugh Ralph*, *Charles Thomson* and *Thomas Fair* respectively, who were, by the said decree of the 7th day of June 1848, (the *Vice-Chancellor's* decree,) respectively removed from being sub-trustees of the same charity. And the said Defendant, *James Bowden*, desiring to be discharged from his sub-trusteeship of the said charity, let him be removed from being a sub-trustee of the said charity. And, *on the proposal of the Defendants, the other trustees of the said charity*, and with the approbation of the *Attorney-General* and with the consent of all the Defendants, let *Henry Brown*, M.D., (being one of the body of dissenters called Independents,) be appointed a sub-trustee of the said charity in the room of the said *James Bowden*. And his Lordship doth declare that, for the time to come, there shall be seven trustees and seven

1849.

THE ATT.-GENERAL v. WILSON.

sub-trustees of the said charity; whereof, in each class, three shall be of the body of dissenters called Independents; three shall be of the body of dissenters called Presbyterians, and one shall be of the body of dissenters called Baptists; and that every trustee or sub-trustee who, in time to come, shall be elected in the room or on the vacancy of an Independent trustee or sub-trustee respectively, shall be elected by the surviving or continuing Independent trustees or trustee; and that every trustee or sub-trustee who, in time to come, shall be elected in the room or on the vacancy of a Presbyterian trustee or sub-trustee respectively, shall be elected by the surviving or continuing Presbyterian trustees or trustee; and that every trustee or sub-trustee who, in time to come, shall be elected in the room or on the vacancy of a Baptist trustee or sub-trustee respectively, shall be elected by the surviving or continuing Independent and Presbyterian trustees or trustee and the Baptist trustee (if any): And let the said *Master* settle and approve of all such conveyances, transfers and assignments as shall be necessary for vesting the trust estates in the said trustees."

Att. Gen. v The Guardians of the Poor of Southampton 17 Sim. 13. Munt v The Shrewsbury & Chester Ry. Co. 13 Beav. 4. Stevens v The S. Devon Ry. Co. id 54. Cooper v Ed. Powis 3 Deg. & S. 694. The Great Western Ry. v Rushout 5 id 301. Att. Gen. v Corporation of Wigan 1 Kay 274. ~~A. Gen.~~ Trevillian v Corporat.n of Exeter 5 D. M. & G. 833.

THE ATTORNEY-GENERAL *v.* THE CORPORATION OF NORWICH.

1848: 4th May.

Borough-fund. Corporation. Municipal Corporations Act.

The Corporation of *Norwich* restrained from soliciting, at the expense of the borough-fund, a Bill in Parliament to enable them to improve the navigation of the river which flows, through that city, to *Yarmouth.*

THE Defendants, after putting in their answer, moved to dissolve an injunction which the Relators had obtained to restrain them from promoting or prosecuting a Bill in Parliament, at the expense of the borough-fund of *Norwich*, to enable them to improve the navigation of the river which flows through that city to *Yarmouth.*

The answer stated that the projected improvement would tend, greatly, to the benefit of the inhabitants of *Norwich*, by facilitating the access of shipping to that city, and increasing the trade thereof; and that the Defendants were authorized by a local Act of Parliament (2nd and 3rd Vict. c. 63) to levy certain tonnage-dues, and to apply them for the purposes specified in that Act, and, after the performance of those purposes, for widening the streets of *Norwich* and removing projecting buildings and other obstructions therein, and for removing projecting buildings and banks on the sides of the river, and other obstructions to the navigation thereof; and that there was a surplus, arising from the tonnage-dues, which was applicable to the improvement of the city and the navigation of the river; but there was not, nor had there been, since the passing of the Municipal Corporations Reform Act (5th and 6th Will. IV. c. 76) any surplus of the borough-fund;* and that the

* The 92nd sect. of that Act enacts that the borough-fund shall be applied towards payment of the salaries of the Mayor, Recorder, Town-clerk and Treasurer of the Corporation, the

1848.

THE ATT.-GENERAL v. THE CORPORATION OF NORWICH.

treasurer of the Corporation, was in the habit of receiving the tonnage-dues, as well as the other revenues of the Corporation which formed the borough-fund, and of paying them to his bankers, in such manner that the same were all blended in one account; and that he had paid 2662*l.*, by cheques on his bankers, to engineers and surveyors whom the Corporation had employed to make surveys and plans of the river and of the intended improvements, in order to enable them to procure the passing of the proposed Bill through Parliament: and the answer submitted that, as the improvements intended to be made under the powers of the proposed Act, would tend greatly to benefit the city and the inhabitants thereof; and, as the Local Act contemplated the improvement of the navigation of the river as one of the objects to which the surplus of the tonnage-dues should be applied; and, as there was a surplus arising from those dues, the obtaining of an Act for the improvement of the navigation, was an object to which the borough-fund, and, more particularly, the fund arising from the tonnage-dues, might be properly applied, it being intended that the amount so applied should be repaid out of the first monies to be raised under the powers of the proposed Act.

Mr. *Bethell*, Mr. *Walker* and Mr. *Rogers* for the Relators, now showed cause against dissolving the injunction.

---

expenses of preparing burgess lists, ward lists and notices, of prosecuting, maintaining and punishing offenders, &c., &c.; and, in case it shall be more than sufficient for those purposes, that the surplus shall be applied, under the direction of the Council, *for the public benefit of the inhabitants* and improvement of the borough.

1848.

THE ATT.-GENERAL v. THE CORPORATION OF NORWICH.

They said that the answer admitted that the expenses of promoting the Bill in Parliament had been paid, in part, out of the borough-fund; for it stated that the engineers and surveyors whom the Corporation had employed to make surveys and plans of the river and of the intended improvements, in order to enable them to procure the passing of the Bill, had been paid out of a fund composed of the tonnage-dues and the borough-fund; and, indeed, that the answer submitted that the borough-fund might be properly applied to defray those expenses; that, under the Municipal Corporations Act, the borough-fund was a trust-fund; and, as it was not sufficient for the performance of the purposes specified in that Act, the Corporation had committed a breach of trust by applying it in the manner stated in their answer: that they said that they intended to repay what they had so applied, out of the first monies to be raised under the powers of the proposed Act; but it was by no means certain that the Act would pass. *The Attorney-General* v. *The Mayor of Liverpool* (*a*), *The Attorney-General* v. *The Corporation of Lichfield* (*b*).

Mr. *Stuart*, Mr. *Lee*, Mr. *James Parker*, Mr. *Heathfield*, Mr. *Hetherington*, and Mr. *Williams* appeared for the Corporation, and for their treasurer and town-clerk, who were co-defendants with them. They relied on *The Attorney-General* v. *The Mayor of Norwich* (*c*), and cited also *Ware* v. *The Grand Junction Waterworks Company* (*d*), *Bright* v. *North* (*e*), *Parker* v. *The River Dunn Navigation Company* (*f*), and *The Attorney-*

(*a*) 1 Myl. & Cr. 171.
(*b*) *Ante*, Vol. XIII. page 547.
(*c*) 2 Myl. & Cr. 406.
(*d*) 2 Russ. & Myl. 470.
(*e*) 2 Phill. 216.
(*f*) 1 De Gex & Smale, 192.

1848.

THE ATT.-GENERAL v. THE CORPORATION OF NORWICH.

General v. *The Manchester and Leeds Railway Company* (*g*).

The VICE-CHANCELLOR:

In *Bright* v. *North* the money was intended to be paid to the Commissioners in order to enable them, not to promote a speculation, but to protect property which was entrusted to their care by the Act of Parliament under which they had been appointed. Therefore, that case and the present are plainly distinguishable from each other.

Mr. *Bethell* replied.

The VICE-CHANCELLOR:

The 92nd section of the Municipal Corporations Act, first specifies certain purposes to which the borough-fund shall be applied, and then says that, in case it shall be more than sufficient for those purposes, it shall be applied, under the direction of the Council, for the public benefit of the inhabitants and improvement of the borough. The Act relating to the tonnage-dues, after mentioning the purposes to which those dues are to be applied in the first instance, says: "Lastly, after the performance of all the purposes hereinbefore mentioned, for or towards making any improvements in the said city of *Norwich*, and particularly for widening the streets and the roads and ways in and leading to the said city, and removing projecting buildings and other obstructions therein, and for removing projecting buildings and banks on the sides of the river running through the said city, and other obstructions to the navigation thereof." Now

(*g*) 1 Railway Cases, 436.

1848.

THE ATT.-GENERAL v. THE CORPORATION OF NORWICH.

it seems to me that the same observation may be made with respect to both those enactments: namely, that they have reference to the state of the law as it existed when they were made; and that they do not authorize the Corporation to apply the funds in obtaining powers which were not then vested in them, and could not be vested in them except by an Act of Parliament specially passed for the purpose.

If this Court had sanctioned the application to Parliament, it would have allowed the Corporation the expenses of the application; but if trustees, whether they be a public body or private individuals, think proper to apply to Parliament, without the sanction of the Court, to enable them to carry into effect a project, which, however beneficial it may appear to be, may, eventually, fail, the Court will not allow them to retain their expenses out of the trust-fund. Therefore, I shall continue the injunction.

1848:
31st May,
and
2nd and 3rd
June.

STILES *v.* GUY.

Executors.
Onus probandi.
Trustee.

By the decree in a suit instituted by persons beneficially interested under a will, one object of which was to charge two of the executors with a debt which the third (who had become insolvent) owed to the testator at his decease, an inquiry was directed, at the suggestion of the solvent executors, whether, if they had taken measures to call in the debt, it could have been recovered: but neither they nor the Plaintiffs prosecuted the inquiry. On the hearing for further directions, the Court held that the solvent executors ought to have prosecuted the inquiry, notwithstanding they must have proved a negative; and, as they had not done so, it ordered them to pay the amount of the debt into Court, with interest from the testator's death.

THE hearing of this Cause is reported in the Appendix to 4 *You.* and *Coll.* Excheq. Cases, page 571.* The decree directed (amongst other things) the *Master* to inquire and state whether, if the Defendants *Richard Tuckey* the younger and *Richard Tuckey* the son, had taken measures to call in the debt due, from the Defendant, *A. Guy*, to the testator, it might or could have been recovered. That inquiry was inserted in the decree, at the suggestion of the Defendants *Richard Tuckey* the younger and *Richard Tuckey* the son, but was not prosecuted: and the *Master*, by his report made in pursuance of the decree, and dated the 24th of June 1847, certified that no statement had been laid before him, by any of the parties to the Cause, to prosecute the said inquiry, but that the Defendants, *Richard Tuckey* the younger and *Richard Tuckey* the son, had

* Two of the Defendants were named *Richard Tuckey*; one of them was the nephew, and the other the son of the testator. The nephew was called in the will, *Richard Tuckey* of *Haydon* in the county of *Wilts*, and the other, "my son *Richard Tuckey*." The report in 4 You. & Coll. speaks of *Richard Tuckey* of *Haydon* and *Richard Tuckey* the younger; but the former was called either *Richard Tuckey* the younger, or *Richard Tuckey* of *Haydon*, and the latter, *Richard Tuckey* the son.

been required, by warrants from him at the instance of the Plaintiffs, to prosecute the same.

On the Cause coming on to be heard for further directions,

Mr. *Bethell* and Mr. *Pitman* for the Plaintiffs, and Mr. *Rolt* and Mr. *Bellas* for Defendants in the same interest, contended that *Richard Tuckey* the son and the estate of *Richard Tuckey* the younger, who was dead, ought to be charged with the debt.

Mr. *Stuart*, Mr. *James Parker* and Mr. *Heathfield*, *contrà*, said that, if a Plaintiff sought to charge a Defendant with a debt due from a third person, he ought, first, to establish the liability of the Defendant to pay the debt; and, therefore, the Plaintiffs in the present case, ought to have prosecuted the inquiry, and to have produced evidence, before the *Master*, to prove the affirmative of the inquiry, namely, that, if the *Tuckeys* had taken measures to call in the debt, it could have been recovered. They added that it was a general rule that no party could be called upon to prove a negative: and they cited *Mucklow* v. *Fuller* (*a*).

Mr. *Bacon*, Mr. *Lloyd*, Mr. *Harrison* and Mr. *Adams* appeared for the other parties.

The VICE-CHANCELLOR, at the conclusion of the argument, said:

Those who seek to exonerate themselves from a debt due from a third person, ought to prove that that person could not have paid the debt.

(*a*) Jacob's Rep. 198.

1848.

STILES v. GUY.

If a debt is due, the law always presumes, until the contrary is shown, that the debtor can pay it. Insolvency cannot be presumed.

3rd of June.

On this day his Honour delivered his judgment, in the course of which he said:

If an executor is sued for a *devastavit* in not having recovered a debt due to his testator's estate, all that it is necessary for the Plaintiff to show, is that the debt existed, and that the executor took no step to call it in. It might be a justification for the executor to prove that, at the death of the testator, the debtor was utterly insolvent: but, until that is proved, the law assumes the fact to be the other way.

Declare that the Defendants *Thomas Tuckey* and *Elizabeth Rhodes*, the personal representatives of the late Defendant *Richard Tuckey* of *Haydon*, and the Defendant *Richard Tuckey* the son, ought to be charged with the sum of 12,981*l.* 5*s.* 4*d.*, being the amount found, by the *Master's* report, to be due from the late Defendant, *Anthony Guy*, to the testator at the time of his death, and order the Defendants *Thomas Tuckey* and *Elizabeth Rhodes*, and the Defendant *Richard Tuckey* the son, to pay the 12,981*l.* 5*s.* 4*d.*, on or before the second day of November next, into the bank to the credit of the cause of *Stiles* v. *Guy*, and that such sum, when so paid in, be laid out in the purchase of Bank £3 per Cent. Annuities, in the name and with the privity of the *Accountant-General*, in trust in that cause: and declare that the Defendants *Thomas Tuckey* and *Elizabeth Rhodes* and the Defendant *Richard Tuckey* the son, ought to be charged with interest, at the rate of four *per cent. per annum*, on the 12,981*l.* 5*s.* 4*d.* from the

10th day of September 1823, the day of the testator's death, to the time of payment.*

* The debt due from *Guy* carried interest.

In the course of the argument in the above case, reference was made to *Maitland* v. *Bateman*, an unreported case. The only particulars of it which the Reporter has been able to ascertain, are that Admiral *Maitland*, deceased, by the settlement on his marriage with the Plaintiff, in January, 1820, covenanted, with the trustees of the settlement, to pay them 10,000*l.* on or before Martinmas Day 1824, to be held by them in trust for himself for life, remainder in trust for the Plaintiff for life, remainder in trust for the children of the marriage.

One of the trustees died in 1821. The Admiral died on the 20th October, 1836, without having paid the 10,000*l.* The suit was instituted by his widow, against *Bateman*, the surviving trustee: and the bill prayed for a declaration that *Bateman* ought to have called in and compelled payment of the 10,000*l.*; and that he might be decreed to make good that sum. At the hearing before the *Lord Chancellor*, on the 27th of November 1840, Mr. *Richards*, for the Plaintiff, asked for a decree directing *Bateman* to pay the 10,000*l.*, because he had not sued Admiral *Maitland* for it. The *Lord Chancellor* directed the *Master* to inquire and state whether Admiral *Maitland*, during the period which intervened between Martinmas 1824 and his death, was of ability to pay the 10,000*l.* or any part of it. The *Master* reported that the Admiral was of ability to pay 4200*l.* and no more, during the period mentioned. On the 23rd of February 1844, the Cause was heard, for further directions, by *Vice-Chancellor Knight Bruce*, who declared that *Bateman* had committed a breach of trust in not taking any measures for the purpose of recovering the 10,000*l.* or any part of it, during the Admiral's life; but that, under the circumstances of the case, he was not liable for such breach of trust, to any greater amount than 4200*l.*; and ordered him to pay that sum into Court with interest from the Admiral's death to the time of payment.

Mr. *Wigram*, Mr. *Russell*, Mr. *Temple*, Mr. *Stinton* and Mr. *Hallett* appeared as Counsel in the Cause before *Vice-Chancellor Knight Bruce*.

Reg. Lib. B. 1843, fol. 567, *b*.

1848: 9th and 10th June.

Construction. Deed.

MORGAN *v.* RUTSON.

In 1814 estates were limited to such uses, &c. as *A.* should appoint, and, in default of appointment, to him for life, remainder to his son for life, remainder to the son's first and other sons in tail male: and those limitations were followed by powers of leasing, and selling and exchanging, the latter of which was to be exercised during the life of *A.* and his son, and with their consent. In 1830, *A.* being desirous of relinquishing his life-interest, appointed the estates to his son for life, remainder to the uses, upon the trusts and *subject to the powers* expressed and contained in the deed of 1814, *ulterior to* the limitations therein for the lives of *A.* and his son. Held that, though the power of sale and exchange was to operate *in derogation of* the life-estates, it was not destroyed by the deed of 1830.

BY an indenture dated the 28th of June 1814, Sir *Charles Morgan*, since deceased, and *Charles Morgan Robinson Morgan*, his eldest son, in exercise of a power reserved to them as therein mentioned, appointed certain estates in the counties of *Hereford* and *York*, to such uses, upon such trusts, and to and for such intents and purposes, and under and subject to such powers, provisoes, declarations and agreements as Sir *Charles*, by any deed or deeds, writing or writings, with or without power of revocation, to be by him *sealed and delivered* in the presence of and attested by two or more credible witnesses, or, by his will, to be signed, published and attested as therein mentioned, should, from time to time, appoint, and, subject thereto, to the use of Sir *Charles* for life, with remainder to *Thomas Swinnerton* and *Thomas Robert Salusbury*, and their heirs, during his life, in trust to preserve contingent remainders, with remainder to his fourth son, *Charles Octavius Swinnerton Morgan*, for life, with remainder to *Swinnerton* and *Salusbury*, and their heirs, during the life of *Charles Octavius Swinnerton Morgan*, in trust to preserve contingent remainders, with remainder to the first and other sons of *Charles Octavius Swinnerton Morgan*, successively, in tail male, with remainder to his daughters as tenants in common in tail, with cross remainders between

1848.

MORGAN v. RUTSON.

or amongst them in tail, with remainder to Sir *Charles* in fee: and the indenture declared that it should be lawful for *Charles Octavius Swinnerton Morgan*, when, by virtue of the limitations therein contained, he should be seised of the actual freehold of the hereditaments thereby appointed, to appoint a rent-charge of 500*l.* a year, to be issuing thereout, to any woman whom he might marry, for her jointure, and to appoint the hereditaments to any person or persons for a term of years to take effect immediately after his decease, for better securing the payment of the jointure: and that it should be lawful for Sir *Charles* during his life and, after his death, for *Charles Octavius Swinnerton Morgan*, when he should be in the actual possession of and entitled to the receipts of the rents of the hereditaments, during his life (provided he should have attained twenty-one) and for *Swinnerton* and *Salusbury* during his minority or during the minority of any child or children who, by virtue of the limitations aforesaid, should be entitled to an estate of freehold and inheritance in the hereditaments, to appoint all or any part or parts thereof, by way of demise, to any person or persons for any term of years not exceeding twenty-one. Then followed this proviso:

"Provided always and it is hereby agreed and declared, by and between the parties to these presents, that it shall and may be lawful to and for the said *Thomas Swinnerton* and *Thomas Robert Salusbury* and the survivor of them and the executors and administrators of such survivor, at any time or times hereafter, at the request and by the direction in writing of the said Sir *C. Morgan* during his life, and, after the death of the said Sir *Charles Morgan*, then at the request and by the direction in writing of the said *C. O. S.*

1848.

MORGAN v. RUTSON.

Morgan when he shall have attained his age of twenty-one years, to dispose of and convey, either by way of absolute sale or in exchange for or in lieu of other manors, lands or hereditaments to be situate somewhere in *England*, all or any part of the lands or hereditaments hereinbefore directed, limited and appointed, as to them, the said *Thomas Swinnerton* and *Thomas Robert Salusbury* or the survivor of them or the executors or administrators of such survivor, shall seem reasonable; and that, for the purpose of effecting such dispositions or conveyances, but not for any other purpose, it shall and may be lawful to and for the said *Thomas Swinnerton* and *Thomas Robert Salusbury* and the survivor of them and the executors and administrators of such survivor, at such request and by such direction as hereinbefore is mentioned, by any deed or deeds, instrument or instruments in writing sealed and delivered by them or him in the presence of and attested by two or more credible witnesses, absolutely to revoke, determine and make void all or any of the uses, trusts, powers and provisoes hereinbefore limited, directed and expressed of and concerning the said messuages or tenements, lands and other hereditaments or any part or parts thereof; and, by the same or any other deed or deeds, instrument or instruments in writing, to limit, declare, direct and appoint any use or uses, estate or estates, trust or trusts of the said hereditaments or any part or parts thereof which it shall be thought necessary or expedient to limit, declare, direct or appoint in order to effectuate such sales, dispositions and conveyances as aforesaid; and also that, upon any such exchange as aforesaid, it shall and may be lawful to and for the said *Thomas Swinnerton* and *Thomas Robert Salusbury* and the survivor of them and the executors or administrators of such survivor, to give or receive any sum or sums of money by way of equality of

exchange; and also that, upon payment of any money to arise by any such sale or to be received for equality of exchange, it shall be lawful for the said *Thomas Swinnerton* and *Thomas Robert Salusbury* and the survivor of them and the executors and administrators of such survivor, to sign and give receipts for the money for which the said hereditaments shall be so sold or which shall be received for equality of exchange, and that such receipts shall be sufficient discharges, to the person or persons to whom the same shall be given, for the money which, in such receipts, shall be acknowledged or expressed to be received, and that such person or persons, his, her or their executors, administrators or assigns shall not afterwards be answerable or accountable for any loss, misapplication or non-application of such money, or be obliged or concerned to see to the application thereof."

The indenture next declared that the money to arise from the sale of the hereditaments or to be received for equality of exchange, should be laid out in the purchase of other lands, with the consent in writing of Sir *C.* during his life, and, after his death, with the consent in writing of *C. O. S. Morgan* if he should have attained twenty-one, and, during the minority of any person or persons for the time being entitled to the rents under the limitations thereinbefore contained, with the consent, in writing, of his, her or their guardian or guardians; and that *Swinnerton* and *Salusbury*, or the survivor of them, the executors or administrators of such survivor, should settle the estates so to be purchased and also the estates to be vested in them in exchange, to and upon the uses and trusts and subject to the powers, provisoes, conditions and agreements expressed and contained in the now stating indenture; and that, until the monies

1848.

MORGAN v. RUTSON.

should be so laid out, it should be lawful for *Swinnerton* and *Salusbury*, and the survivor of them, and the executors, administrators and assigns of such survivor, to invest the monies in their names, in the funds or on real securities, with the consent in writing of Sir *Charles* during his life, and after his death, of *C. O. S. Morgan* during his life, and, after his decease, at their own discretion; and that the interest and dividends should be paid and applied as the rents of the hereditaments to be purchased would be payable or applicable if such purchase and settlement had been made. The indenture then contained a covenant, by Sir *Charles* and *Charles Morgan Robinson Morgan*, with *Swinnerton* and *Salusbury*, for the further assurance of the hereditaments to the uses, &c. thereinbefore declared and contained: and that covenant was followed by a declaration of trust as to certain sums of money; and then came the following proviso:

"Provided always and it is hereby agreed and declared, between and by the said parties to these presents, that, if the said trustees in and by these presents nominated and appointed, their heirs, executors, administrators or assigns, or any future trustee or trustees to be appointed in the stead or place of them or any of them as hereinafter is mentioned, shall happen to die or be desirous of being discharged from, or refuse or decline or be incapable to act in the trusts hereby in them respectively reposed as aforesaid, before the said trusts shall be fully executed, performed and discharged, then and in such case and when and so often as the same shall happen, it shall and may be lawful to and for the said Sir *Charles Morgan* during his life, and, after his decease, to and for the said *Charles Octavius Swinnerton Morgan*, his executors or administrators, by any writing or writings *under their, his or her hands and seals or hand and seal,*

to be attested by two or more credible witnesses, from time to time to nominate, substitute or appoint any other person or persons to be a trustee or trustees in the stead or place of the trustee or trustees so dying or desiring to be discharged or refusing, declining or becoming incapable to act as aforesaid, and all the trust estates, monies and premises which shall then be vested in the trustee or trustees so dying or desiring to be discharged or refusing, declining or becoming incapable to act as aforesaid, shall be, thereupon, with all convenient speed, conveyed, assigned and transferred in such sort and manner and so as that the same shall and may be legally and effectually vested in the surviving or continuing trustee or trustees of the same trust-estates, monies and premises respectively, and such new trustee or trustees only*, to the same uses and upon the same trusts as are hereinbefore declared of and concerning the same trust-estates, monies and premises, or such of them as shall or may be then subsisting and capable of taking effect: And it is hereby further agreed and declared, between and by the said parties to these presents, that every such new trustee or trustees shall and may, in all things, act and assist, in the management, carrying on and execution of the trusts to which he or they shall be so appointed, in conjunction with the other then continuing or surviving trustee or trustees of the same trust-estates, monies and premises respectively, if there shall be any such continuing trustee or trustees, and if not, then by himself and themselves respectively, as fully and effectually and with all the same power and powers, authority and authorities of consent, approbation, discretion, calling in, laying out and investing, giving and signing receipts and effectual indemnifications and discharges to purchasers, mortgagees or others, and all other powers and authorities whatsoever, to all intents, effects, constructions and pur-

* *Sic.*

1848.

MORGAN v. RUTSON.

poses whatsoever, as if he or they had been originally, in and by these presents, nominated a trustee or trustees, and as the trustee or trustees in these presents named, his or their heirs, executors or administrators, in or to whose place such new trustee or trustees shall respectively come or succeed, are or is enabled to do or could or might have done under and by virtue of these presents, if then living and continuing to act in the trusts hereby reposed in them."

By an indenture dated the 1st of July 1819, and made between Sir *Charles Morgan* of the one part, and *George* Lord *Rodney* and *Francis Miles Milman* of the other part, and which recited the indenture of the 28th of June 1814, but did not notice *the power to appoint new trustees* therein contained; and which recited also that Sir *Charles* was desirous that Lord *Rodney* and *Milman* should be trustees of the several trusts and powers expressed and contained in the indenture of the 28th of June 1814, in the place of *Swinnerton* and *Salusbury*; and that, in order to effect such his desire, Sir *Charles* had agreed to exercise, in the manner hereinafter expressed and contained, *the power of appointment given to him by the indenture of the 28th of June*, and that he had signified his said desire to Lord *Rodney* and *Milman*, and that they had agreed to accept the said trusts and powers: It was witnessed that, for effectuating the purpose aforesaid, Sir *Charles, by virtue of the power given or reserved to him by the indenture of the 28th of June*, and of every other power him in anywise enabling in that behalf, did, by the now stating indenture or deed in writing by him *sealed and delivered* in the presence of and attested by the two credible persons whose names were thereupon indorsed as witnesses attesting the sealing and delivery thereof by him, *appoint*

1848.

MORGAN v. RUTSON.

that, from and after the sealing and delivery by him of the now stating indenture, all the *hereditaments* comprised in and appointed by the indenture of 28th June should be and remain to the uses, upon and for the trusts, intents and purposes, and with and under and subject to the powers, provisoes, agreements and declarations *which would then be subsisting or* capable of taking effect, in the same hereditaments, under and by virtue of the indenture of the 28th of June, *if the names of Lord* Rodney *and* Milman *had been inserted in that indenture instead of the names of* Swinnerton *and* Salusbury, and the estates, trusts, powers and authorities thereby given or limited to *Swinnerton* and *Salusbury*, their heirs, executors, administrators or assigns or to them or the survivor of them or the heirs, executors, administrators or assigns of such survivor, had been, thereby, given or limited to Lord *Rodney* and *Milman*, their heirs, executors, administrators or assigns or to Lord *Rodney* and *Milman* or the survivor of them or the heirs, executors, administrators or assigns of such survivor.

By an indenture dated the 24th of February 1830 and made between Sir *C. Morgan* of the one part, and *Charles Octavius Swinnerton Morgan* of the other part, which recited the indenture of the 28th of June 1814, but did not notice the indenture of the first of July 1819, and which recited also that Sir *Charles* was desirous of relinquishing his life estate in the hereditaments in the counties of *Hereford* and *York* in the indenture of the 28th of June 1819 particularly described, so that his son, *C. O. S. Morgan* might take an immediate estate of freehold therein for his life: It was witnessed that, by virtue and in part exercise of the power given to Sir *Charles* by the indenture of 28th June, and

1848.

MORGAN v. RUTSON.

of all other powers in anywise enabling him in that behalf, he did, by the now stating deed or instrument in writing by him sealed and delivered in the presence of and attested by the two credible persons whose names were intended to be indorsed thereupon as witnesses attesting the sealing and delivery thereof by him, appoint that all the hereditaments situate in the counties of *Hereford* and *York* thereinbefore particularly mentioned and described, should, immediately upon the execution of the now stating indenture and thenceforth be and remain to the uses, upon and for the trusts, intents and purposes, and with, under and subject to the powers, provisoes, declarations and agreements thereinafter limited, expressed and declared of and concerning the same, that was to say, to the use of *C. O. S. Morgan* for life without impeachment of waste, with remainder to the use of Lord *Rodney* and *Milman* (who were described in the now stating indenture as the trustees duly appointed, in the place of *Swinnerton* and *Salusbury*, to preserve the contingent remainders created by the indenture of the 28th of June), their heirs and assigns during the life of *C. O. S. Morgan* in trust to preserve the contingent remainders *thereinafter limited;* and that, after the decease of *Charles Octavius Swinnerton Morgan*, the same hereditaments should be and remain to the several uses and estates, and upon the several trusts, intents and purposes, and with, under and subject to the several powers, provisoes, declarations and agreements: "as* are expressed and declared of and concerning the same hereditaments in and by the said hereinbefore in part recited indenture of 28th day of June 1814, *ulterior to the limitations therein for the respective lives of the said Sir* C. Morgan *and* C. O. S. Morgan, and to, for and upon no other use, trust, intent or purpose whatsoever.

* *Sic.*

1848.

MORGAN v. RUTSON.

By an indenture dated the 4th of June 1845 and made between Sir *C. Morgan* of the first part, *Milman* of the second part, *William Powell Rodney* of the third part, and *John Burley* of the fourth part,* after reciting the indenture of the 28th of June 1814 and the powers of sale and exchange and to appoint new trustees therein contained; and after reciting the indentures of the 1st of July 1819, and 24th February 1830, and that *Salusbury* died in the lifetime of *Swinnerton*, and that the latter died on the 9th of May 1836, and that Lord *Rodney* died on the 21st of June 1842, and that Sir *Charles* was desirous, in exercise of such powers as might enable him in that behalf, of making such appointment of trustees or a trustee as thereinafter appearing: It was witnessed that, in pursuance of the said desire and in exercise of all and every the powers for those purposes given to or vested in Sir *Charles* by or by virtue of the indentures of the 28th of June 1814, the first of July 1819, and the 24th February 1830 or some or one of the same indentures, and of every other power in anywise enabling him thereunto, Sir *Charles*, by the now-stating deed or writing, by him *signed*, sealed and delivered in the presence of and attested by the two credible persons whose names were intended to be thereupon indorsed as witnesses attesting the signing, sealing and delivery thereof by him, appointed *Milman* and *William P. Rodney* in the places of *Swinnerton* and *Salusbury*, (so far as their respective places in the trustee-

* It was stated, in the observations at the end of the Plaintiff's brief, that this indenture was executed in consequence of Counsel having advised that it was doubtful whether the deed of the 24th of February 1830, had not the effect of restoring, either wholly or partially, to the original trustees of the indenture of the 28th of June 1814, the powers of leasing, and selling and exchanging vested in them thereby.

1848.

MORGAN v. RUTSON.

ship could or might, by the now-stating indenture, be supplied) and *William P. Rodney* in the place of Lord *Rodney* (so far as his place in the trusteeship could or might, by the now-stating indenture, be supplied) to be trustees and a trustee of the indenture of the 28th June 1814, and the indentures of the 1st of July 1819 and 24th of February 1830 respectively. And, by the now-stating indenture, *Milman* conveyed, to *William Powell Rodney* and his heirs, all the hereditaments in the counties of *Hereford* and *York*, comprised in the indenture of the 28th June 1814: to hold the same to *Rodney* and his heirs, to the use of him and *Milman*, their heirs and assigns, for and during the same estate and interest as was limited to and vested in Lord *Rodney* and *Milman*, their heirs and assigns by the indenture of 24th February 1830, and upon and for the trusts, intents and purposes, and with, under and subject to the powers, provisoes, agreements and declarations by the same indenture declared and referred to of and concerning the same; or such of the said trusts, intents and purposes, powers, provisoes, agreements and declarations as were then subsisting and capable of taking effect.

The bill, which was filed by *Charles Octavius Swinnerton Morgan*, and Messrs. *Milman* and *Rodney*,* set forth the deeds hereinbefore stated, and that, in January 1848, *Milman* and *Rodney*, as such trustees as aforesaid, and with the consent and by the direction of *C. O. S. Morgan*, agreed to sell a certain part of the hereditaments in the county of *York*, to the defendant *William Rutson*; and that all the objections taken by him to the title had been answered or effectually removed, except one which he

* It was said, in the course of the argument in this case, though it was not stated in the bill, that Sir *C. Morgan* died in December 1845.

had taken to the validity of the power of sale contained in the indenture of the 28th of June 1814, *which power, he alleged, was defeated, superseded or rendered unavailable by the execution of the indentures stated, in the bill, to have been subsequently executed, or some or one of them:* that, at one time, the Defendant insisted that *Milman* and *Rodney* had not been properly appointed such trustees as aforesaid, and that, although the Plaintiffs were advised that they had been properly appointed, yet that, in order to avoid any possible difficulty, it was determined that a deed of confirmation and appointment should be executed as next thereinafter stated. The bill then set forth that deed, which was dated the 4th of May 1848, and signed, sealed and delivered by *C. O. S. Morgan* in the presence of two attesting witnesses: and, thereby, he, in exercise of every or any power enabling him in that behalf, nominated, substituted and appointed *Milman* and *Rodney* in the places of *Swinnerton* and *Salusbury*, so far as their places in the trusteeship could be thereby supplied, and *Rodney* in the place of Lord *Rodney*, so far as his place in the trusteeship could be thereby supplied, to be trustees or a trustee of the indentures of the 28th of June 1814, the first of July 1819, and the 24th of February 1830: and *Milman* and *Rodney* conveyed the hereditaments in the counties of *Hereford* and *York*, to *Burley* and his heirs, to the use of *Milman* and *Rodney* their heirs and assigns, for and during the same estate and interest as were limited to and vested in Lord *Rodney* and *Milman*, their heirs and assigns by the indenture of the 24th of February 1830, so far as the same were then undetermined and capable of taking effect, and upon and for the trusts, intents and purposes, and with, under and subject to the powers, provisoes agreements and declarations, in and by the same indenture declared and referred to of and concerning the

1848.

MORGAN v. RUTSON.

same, or such of the said trusts, intents and purposes, powers, provisoes, agreements and declarations as were then subsisting or capable of taking effect.

The bill charged that the power of sale was a valid and subsisting power, and that, under the several deeds and instruments thereinbefore mentioned, the Plaintiffs had good right and full power to convey and assure the purchased premises, to the Defendant or as he should direct; and it prayed for a specific performance of the agreement.

The Defendant having declined to take a case for the opinion of a Court of Law upon the question raised by the pleadings,

Mr. *Bethell* and Mr. *Glasse* for the Plaintiffs, said:

The deed of June 1814 gave *Swinnerton* and *Salusbury* a power of sale and exchange, which was to be exercised at the request of Sir *Charles Morgan* during his life, and, after his death, at the request of his son; and it contains a power to appoint new trustees, which was to be exercised by Sir *Charles* during his life, and, after his death, by his son; and that power provides that the new trustees shall have the same powers as the original trustees had. In July 1819, Sir *Charles* executed a deed, dated the first day of that month, for the purpose of appointing new trustees.

Mr. *James Parker*, for the Defendant.—That deed was not, simply, an appointment of new trustees; it was executed by Sir *Charles* in pursuance of the *general* power of appointment reserved to him by the deed of June 1814.

1848.

MORGAN v. RUTSON.

Argument for the Plaintiffs resumed. — The only effect of the deed of July 1819, was to limit the estates to the uses of the original settlement, with a change in the names of the trustees. That deed was followed by the deed of February 1830: the sole object of which, as appears by the recital, was the relinquishing, by Sir *Charles*, of his life-estate, so that his son might take an immediate estate of freehold in the hereditaments. After limiting that estate and the necessary estate to the trustees to preserve contingent remainders, Sir *Charles* directs that the hereditaments shall be and remain to the uses and estates, and upon and for the trusts, intents and purposes, *and with, under and subject to the powers*, provisoes, declarations and agreements *expressed and declared, of and concerning the same*, in and by the indenture of June 1814, *ulterior to* the limitations therein for the lives of himself and his son, and to, for and upon no other use, trust, intent or purpose whatsoever. The draftsman who prepared that deed, used the word, "ulterior," because Sir *Charles* had a general power of appointment which was *anterior* to his life-estate, and which it would have been contrary to the intention of the parties to recreate; but they did mean to preserve all the powers which were *posterior*, or ulterior *in point of position in the settlement*, to the limitations: for they declare that the hereditaments shall remain subject to the powers contained in the deed of June 1814: but they would not remain subject to those powers if the construction of the word, "ulterior," which the purchaser's counsel will contend for, (namely, to take effect after the death of Sir *Charles* and his son,) is adopted: for, with the single exception of the power to appoint new trustees (which may be exercised after the son's death) none of the powers contained in the deed of June 1814, were to continue beyond the son's life.

1848.

MORGAN v. RUTSON.

If it should be said that the deed of February 1830 was a re-writing of the deed 1814, and, that, therefore, it gave back the power of sale and exchange to *Swinnerton* and *Salusbury*, we shall contend that that objection is obviated by the deed of May 1848.

Mr. *James Parker* and Mr. *De Gex*, for the Defendant, said that the appointment of February 1830, was made, by Sir *Charles Morgan*, in exercise of his general, over-reaching power; and that the effect of it was to destroy the life-estates previously vested in him and his son and the power of consenting to an exercise of the power of sale and exchange by the trustees, and all the other powers annexed to those estates, and to limit, to the son, an entirely new estate, without any powers; and that the expression: "powers ulterior to," in that deed, meant, not: "subsequent in position," but: "subsequent in operation and effect" to the limitations for the lives of Sir *Charles* and his son; which the power of jointuring and the power of leasing given to guardians were, but which the power of sale and exchange was not; for it was to operate upon and take effect in derogation of those estates; and, consequently, it was not re-created by the concluding words of the deed of February 1830.

The VICE-CHANCELLOR, without hearing Mr. *Bethell* in reply, said:

At present, my impression is against the objection; but I will read over the deeds before I dispose of the case.

1848.

MORGAN v. RUTSON. 10th June.

10th June.—On this day his Honour delivered a written judgment which was as follows:

I have read over all the deeds, and retain the opinion that I expressed yesterday.

The doubt in this case was occasioned by the words, "ulterior to;" one a *Latin* word used as an *English* word, and the other, simple, native, old *English*. Prepositions, such as *ultra*, and the adjectives derived from them naturally referring to space, are metaphorically applied to time, and bear the sense of addition: as, for instance: "*quid ultra tendis;*" "*ripæ ulterioris amore;*" "*ulteriora mirari, præsentia sequi;*" "*pudor est ulteriora loqui;*" "*ultima primis cedunt.*" So our common *English* words, "above," "beyond," "over," are used with reference to space and time, and imply addition. But the author of the deed 1830, very properly wishing to avoid expense and prolixity by substituting reference for transcription, has added the word, "to," by way of enlarging and fixing the sense of the word, "ulterior," and connecting it with the words, "remainders over." And it seems to me that no reasonable interpretation can be given to those words, but that which will describe something that comes after and in addition to, that is,* the uses, limitations and powers which, in the deed of 1830, are to be found subsequent and in addition to the limitations to the son for life and to the trustees to preserve.

* *Sic* in original.

And, in my opinion, the point is so clear that, unless the parties have made some other arrangement, the Defendant must pay the costs of settling the question which he has raised.

1848:
June.

Injunction.

The word, "trial," in an order to extend the common injunction, means the trial of an issue of fact, and not of a question of law raised by demurrer.

LOWE *v.* FAULKNER.

AFTER *Lowe* had *demurred* to the declaration in an action brought against him by *Faulkner*; he obtained an injunction, for want of answer, to restrain *Faulkner* from proceeding with the action; and, subsequently, moved, on the usual affidavit, to stay the trial of the action.

The *Vice-Chancellor* ordered the motion to stand over until the Court of Law should have given judgment upon the demurrer.

After the demurrer had been *allowed*, the motion was mentioned again: and,

The *Vice-Chancellor*, being of opinion that the word, "trial," meant the trial of an issue of fact, and not of a question of law, refused the motion with costs.

Mr. *Lewin* appeared for *Lowe*, and Mr. *Roundell Palmer*, for *Faulkner*.

PORTER *v.* SMITH.

1848: 9th June.

Construction. Will. Ademption. Republication.

A testator being underlessee, for a long term of years, of two

IN 1784 a lease of a piece of ground in *Gower Street, Bedford Square*, with the four houses erected thereon, (which were afterwards numbered 62, 63, 64 and 65) was granted, to *William Scott*, for 99 years, at the yearly rent of 2*l.* 8*s.* In 1785 *Scott* underlet the houses numbered 63 and 64 at the yearly rent of 9*l.* 8*s.* each, for the then remainder of his term except 21 houses in *Gower Street* numbered 63 and 64, and being possessed of two other houses in that street, numbered 67 and 76, for the residues of certain terms for years, bequeathed them to trustees in trust for *D. C.* for her life, remainder in trust, as to 63, 64 and 67, for his half-brothers and half-sisters (whom he named) and the survivors and survivor of them for their, his or her lives or life, remainder in trust to sell and divide the proceeds amongst their children living at the death of the survivor of them; and, as to number 76, in trust, after the decease of *D. C.*, for his niece *S. C.*, for life, remainder in trust for her children who should survive her, and, in default of such children, upon the same trusts as he had declared of the other houses after the death of *D. C.*; and he gave the residue of his effects to *D. C.*, and appointed her his executrix.

The testator, some years after the date of his will, took an assignment of the original lease, which comprised numbers 62 and 65 as well as 63 and 64: and, a few months afterwards, made a codicil, by which he confirmed his will. He, subsequently, made another codicil, which was, in part, as follows: "I also give, subject to her life estate, one moiety of the residue of my estate, unto and amongst my nephews and nieces living at my decease, payable in like manner as, by my will, is directed concerning their shares and interests in the reversion of my houses in *Gower Street*, except that their shares and interests in the said moiety, is to depend, solely, on the decease of my executrix." *D. C.* and all the testator's half-brothers and half-sisters, died before the suit was commenced.

Held that, though the bequest, in the will, of numbers 63 and 64, was adeemed by the testator taking an assignment of the original lease, the effect of the last-mentioned codicil was to entitle the children of the testator's half-brothers and half-sisters who were living at the decease of the survivor of them, to the testator's interest in numbers 63 and 64, *as it existed at his death.*

1848.

PORTER v. SMITH.

days. In January 1800, *Thomas Loggen*, the testator in the Cause, became the assignee of the underleases. In September 1805, at which time he still held the two last-mentioned houses under the assignment of the underleases, and was possessed of two other houses in *Gower Street*, numbered 67 and 76, for the residue of certain terms therein, he made his will, and thereby gave: "my houses in *Gower Street*, *Bedford Square*, (Nos. 63, 64, 67 and 76,)" to *Damaris Courtier*, *Richard Nicholl*, *Richard Smith* and Dr. *Pinkard*, in trust for the separate use of *Damaris Courtier* during her life, and, after her decease, in trust, as to the houses numbered 63, 64 and 67, for his brothers-in-law and sisters-in-law therein named, (who were, in fact, his half-brothers and half-sisters,) and the survivors and survivor of them, and, after the decease of the survivor, in trust to sell and to pay the proceeds to the children of his said brothers-in-law and sisters-in-law living at the decease of the survivor of them, in equal shares: and, as to the house numbered 76, in trust, after the decease of *Damaris Courtier*, for the separate use of his niece, *Susannah Collins*, during her life, and, after her decease, for all the children of his niece who should survive her; and, in default of such children, upon the same trusts as he had declared concerning the three other houses after the decease of *Damaris Courtier*: and he gave the residue of his estate and effects to *Damaris Courtier* absolutely, and appointed her and *Richard Nicholl* and Dr. *Pinkard*, to be the executrix and executors of his will. A few days afterwards, he made a codicil, and thereby devised and bequeathed the estates and monies which were vested in him either as a trustee or as an executor, but did not otherwise alter his will.

In April 1807, the houses numbered 62, 63, 64 and 65

1848.

PORTER v. SMITH.

were assigned to the testator, for the then remainder of the term of 99 years created by the original lease of 1784, subject to the rent of 2*l.* 8*s.* thereby reserved and to the covenants therein contained, and also to the underlease of 1785; and, the bill stated that the testator, from the date of that assignment until his death, continued possessed of the houses numbered 63 and 64, for the residue of the term of 99 years and subject as aforesaid.

In August 1807, he made a codicil by which he revoked the appointment, made by his will, of Dr. *Pinkard* to be one of his executors and trustees and the bequests thereby made to that gentleman, *and confirmed his will.*

In August 1810 he made another codicil which was, in part, as follows: "I give to my friend, *Richard Nicholl,* Esq., 50*l.* in addition to his former legacy as one of my executors; and I appoint my friend, *John Aldridge,* Esq., to be another of my executors, and an additional trustee in all cases where Doctor *Pinkard* was a trustee, and give him 100*l.* for his trouble. I direct my executors to give ten guineas to each of my nephews and nieces independent of other legacies, or to apply it for their benefit, for mourning, immediately after my decease. I also give, subject to her life interest, *one moiety of the residue of my estate unto and amongst my nephews and nieces living at my decease, payable in like manner as by my will is directed concerning their shares and interests in the reversion of my houses in* Gower Street, *except that their shares and interests in the said moiety is to depend solely on the decease of my executrix.*"

The testator died in September 1810. *Damaris Cour-*

1848.

PORTER v. SMITH.

interested, as such representatives, in the residuary estate of the testator, so far as the same had not been duly applied and disposed of; and insisted that the estate and interest which the testator had, at his death, in the two houses, was not specifically bequeathed by him, but passed under his residuary bequest; and they also claimed to be interested in the rents of those houses which had accrued since the death of *Damaris Courtier*.*

Mr. *Bethell* and Mr. *J. Baily*, for the Plaintiffs:

It must be admitted that the bequest, in the will, of the houses numbered 63 and 64, was adeemed by the assignment of the original lease, made to the testator in April 1807: but the second codicil, which was made subsequently to that assignment, republished the will, and made it speak and take effect from the date of the codicil; and, consequently, the interest in the houses which the testator had at the date of that codicil, passed under the bequest of them contained in the will: *Carte* v. *Carte* (*a*). Then, in the third codicil, the testator uses the words: "My houses in *Gower Street*," by which he must have meant the houses as they were then held by him: and he refers to the interests of his nephews

* It was stated in the observations at the end of the brief, for the Plaintiffs, that the question to be determined was whether, the will, as republished by one or other of the codicils, was sufficient to pass, to the trustees for sale, the interest in the superior lease of 1784, which the testator acquired, by purchase, subsequently to the date of his will: and that the point had been raised by the counsel advising on behalf of the purchaser of the house numbered 63, to whom the trustees of the will had sold it, but who had refused to complete the purchase until the question had been decided.

(*a*) 3 Atk. 174.

and nieces in them as being subsisting interests: and it is abundantly clear, from the immediately preceding words, that he did not mean them to form part of his residuary estate. We submit, therefore, that the Plaintiffs are entitled to what they ask by their bill.

Mr. *Walpole* and Mr. *Malins*, for the personal representative of *Damaris Courtier*:

The acquisition of the superior lease of the houses, was an ademption of the bequest of them contained in the will: and the title of the Plaintiffs rests, wholly, on the third codicil. That instrument does not manifest any intention to give anything except what had been given by the will. It refers to the houses, not for the purpose of disposing of them, but of prescribing the manner in which the nephews and nieces of the testator, were to take one moiety of the residue of his estate: *Slatter* v. *Noton* (*b*).

Mr. *James Parker* and Mr. *Birkbeck*, for the personal representatives of the nephews and nieces of the testator who were living at his decease, but died before *Mary Smith*:

The testator, at his death, had the same interest in the houses numbered 67 and 76 as he had when he made his will; and, therefore, those houses continued subject to the operation of his will, and are sufficient to satisfy the words in the third codicil, by which he refers to his will. There is nothing to show that the words in that codicil: "My houses in *Gower Street*," refer to the houses numbered 63 and 64, in which he had acquired a

(*b*) 16 Ves. 197.

1848.

PORTER v. SMITH.

totally different interest: and the republication of a will, does not have the effect of making it operate upon property in which the testator has a totally different interest, at the date of the codicil, from that which he had at the date of his will: *Pattison* v. *Pattison* (*c*).

Mr. *Rolt* appeared for the other parties.

The VICE-CHANCELLOR:

It appears to me to be plain, from the language of the third codicil, that the testator intended that his nephews and nieces should take his interest in the houses in *Gower Street*, as it existed at the date of that codicil.

The decree declared that the estate and interest which the testator had in the houses numbered 63 and 64, passed to *Damaris Courtier*, *Richard Nicholl*, *Richard Smith* and *John Aldridge*, the trustees named in the will and third codicil, upon the trusts declared of such houses by the will: and, it appearing from the answer of one of the Defendants, and another of the Defendants admitting, by his Counsel at the bar, that contracts had been entered into for the purchase of those houses, the decree directed the trustees to complete those contracts, and, after paying the costs of the suit out of the purchase-monies, to pay one-fifth of the surplus to each of the Plaintiffs.

Reg. Lib. B. 1847, fol. 1086.

(*c*) 1 Myl. & Keen, 12.

COLE *v.* SCOTT.

1848:
14th June.

Construction.
Will.

A testator, by his will dated after the recent Will Act had come into operation, expressed himself thus: "And, as to all and singular the residue and remainder of my messuages, lands and hereditaments, whatsoever and wheresoever, and of what tenure or nature soever, and, generally, all the freehold, copyhold, and leasehold estates whereof *I am now seised or possessed:*" and, in a subsequent part of his will, he used these words: "I give to my nephew, all such manors, farms, &c. as well freehold as copyhold and leasehold, as are now vested in me, or, as to the said leasehold premises, *as shall be vested in me, at the time of my death*, as a trustee; to hold, unto and to the use of my said nephew, his heirs, executors, &c., upon the like trusts as the same *are now or shall be vested in me.*" The testator purchased a freehold estate after the date of his will. Held that the will could not be construed to speak and take effect, with reference to the estates to which the testator died beneficially entitled, as if it had been executed immediately before his death.

THE bill, which was filed by the heir-at-law against the executors and the residuary devisees and legatees under the will of *Jno. Cole*, the testator in the Cause, stated that the testator made his will dated the 9th of August 1843, and in the following words:

"I give, devise and bequeath, unto my dear wife, *Ann Cole*, all and singular the messuage, tenement or dwelling-house and premises near the church in *Odiham*, in the county of *Southampton*, wherein I now reside, except the building thereto adjoining, being the offices in which I carry on the profession of an attorney, and also all that piece of pasture land adjoining the churchyard there, and the two pieces of meadow or pasture called *Turtles* and *Newlands Meadows*, and also the premises called the *Farm-yard*, (the whole of the foregoing being in my own occupation) to hold to her, my said wife, during her natural life; and, from and after her decease, I give, devise and bequeath the same, unto my nephew, *Henry Scott*, his heirs and assigns for ever. I also give, devise and bequeath, unto my said wife, all that moiety or half-

Morgan v Thomas 6 Q.B. 179

1848.

COLE v. SCOTT.

The bill further stated that the testator died on the 4th of September 1846, and that, subsequently to the date and execution of his will, he entered into a contract, in writing, for the purchase of certain freehold hereditaments, and accepted the title thereto, but died before the contract was completed and before the purchase-money was paid; and that the Plaintiff was advised that, according to the true construction of the will, the testator died intestate as to those hereditaments, and that the same descended to the Plaintiff as the testator's heir-at-law, and that the Plaintiff was entitled to have the contract completed for his benefit, and the purchase-money paid out of the testator's personal estate. The bill charged that, according to the true construction of the will, it ought to be taken to speak and take effect from the date thereof, and, consequently that the testator died intestate as to the hereditaments which he had contracted to purchase; and it prayed that it might be declared that the testator died intestate as to those hereditaments, and that the Plaintiff was entitled to have the contract completed for his benefit, and the purchase-money paid, by the executors of the testator, out of his residuary personal estate, and that the contract might be completed and the purchase-money paid accordingly.

The Defendants put in a general demurrer.

Mr. *Malins*, in support of the demurrer, (Mr. *Bacon* was with him) said: The 24th section of the Act for the Amendment of the Laws with respect to Wills, (7 Will. IV. & 1 Vict. c. 26) enacts that every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the

1848.

COLE v. SCOTT.

death of the testator, unless a contrary intention shall appear; and, as the testator in this case, was a solicitor, he must be supposed to have known the law; and, therefore, if he had not intended his will to pass after-purchased estates, he would have expressed that intention; but he has not expressed it, nor is there anything, in his will, from which it can be inferred. In *Doe* v. *Walker* (*a*) the Court of Exchequer decided that after-purchased estates passed by a devise of: "all my messuages, farms, lands, tenements and hereditaments, which I am seised of."

The *Vice-Chancellor*.—The expression: "which I am seised of," is ambiguous: it may mean either: "which I am seised of at the date of this my will," or "which I may be seised of at the time of my death. In this case, the testator says: "whereof I am *now* seised."

Argument resumed.—The word, 'now,' is a mere redundancy, and was treated as such in *Auther* v. *Auther* (*b*): where it was held that a bequest of 10,000*l*. Consols, "now standing in my name," was not specific. Besides which, the words, "all and singular the residue and remainder of my messuages, farms, lands, hereditaments and premises whatsoever and wheresoever, and of what tenure or nature soever," are sufficient to include all the real estates which the testator then had or might thereafter have, except those which he had disposed of in the preceding part of his will, and, the devise of trust and mortgaged estates, shows that the testator intended after-acquired estates to pass by his will. But it is not necessary for me to show that

(*a*) 12 Mees. & Wels. 591.

(*b*) *Ante*, Vol. XIII. page 422.

1848.

COLE v. SCOTT.

the testator did intend after-purchased estates to pass; for, as the law now stands, they must be held to pass, unless an intention to the contrary shall appear; and I submit that there is nothing, in this will, to show that contrary intention.

Mr. *Bethell*, Mr. *Campbell* and Mr. *R. W. Moore* appeared in support of the bill; but

The VICE-CHANCELLOR, without hearing them, said:

The question in this case, is whether a contrary intention appears on the face of the will; because, if it does not, the words which the testator has used are sufficient to pass the subsequently acquired property.

Those words are: "And as to all and singular the residue and remainder of my messuages, farms, lands, hereditaments and premises whatsoever and wheresoever, and of what tenure or nature soever, and, generally, all the freehold, copyhold and leasehold estates whereof I am now seised or possessed in any manner howsoever:" and the question is whether it is not plain, from the construction which the testator, himself, has put on the word, "now," that he meant it to include those tenements only which he had on the very day on which he made his will?

When we look at the subsequent clause, we find that he has plainly told us what he meant by the word, 'now:' for he expresses himself thus: "I give, devise, and bequeath, unto my said nephew, *H. Scott*, all such manors, messuages, farms, lands tenements and hereditaments whatsoever, as well freehold as copyhold and leasehold, as are now vested in me, or, as to the said leasehold premises, *shall be vested in me at the time of my*

death." The concluding words of that sentence show that, according to his conception, the word, 'now,' would not pass leaseholds of which he might become possessed thereafter. Then he adds: "to hold, unto and to the use of the said *H. Scott*, his heirs, &c., upon and subject to the like trusts as the same are now, *or shall be vested in me.*" Now he must have known that he could not vary the trusts of those estates; and, consequently, he could not have introduced the words: "or shall be vested in me," for any other purpose than that of marking the distinction between the then present and a future time.

It appears to me, therefore, that he has, himself, put a construction on the word, 'now,' and has given it the same effect as if he had said: "On this the day of making my will."

Demurrer overruled.*

* An appeal is pending before the *Lord Chancellor.*

1848:
15th June.

Construction. Will.

Testator devised estates to trustees, in trust to pay 300*l.* a-year, *for the maintenance, clothing and education* of his son's children, during the life of their father. The son had three children, all of whom attained twenty-one, and, then, one of them died.

Held that the personal representative of the deceased child was entitled to one-third of the 300*l.* a-year during the father's life.

LEWES *v.* LEWES.

THE testator in this Cause, devised estates to trustees, in trust to receive the rents and to pay, thereout, the yearly sum of 300*l.*, for and towards the maintenance, clothing and education of all and every the children of his eldest son, in equal shares and proportions, during the life of the son.

The son had three children; all of whom attained twenty-one. One of them died in August 1846.

Mr. *Bethell* and Mr. *Bloxam*, for the two surviving children, contended that the 300*l.* a-year was given to the children as a class; and that, as one of them was dead, and, consequently, no longer required either maintenance, clothing or education, the whole of the fund ought to be applied to the maintenance, clothing and education of the two survivors.

Mr. *James Parker* for the widow and personal representative of the deceased child, cited *Anon.* (*a*), *Barlow* v. *Grant* (*b*), *Barton* v. *Cooke* (*c*), *Neale* v. *Willis* (*d*), *Hamley* v. *Gilbert* (*e*), and *Badham* v. *Mee* (*f*).

Mr. *Bethell* replied.

The VICE-CHANCELLOR:

I think that there is no sensible way of dealing with

(*a*) Prec. Chan. 597.
(*b*) 1 Vern. 255.
(*c*) 5 Ves. 461.
(*d*) Barnard. C. C. 43.
(*e*) Jacob's Rep. 354.
(*f*) 1 Russ. & Myl. 631.

Bayne v Crowther 20 Beav. 401.

this case, except by taking the words: "for the maintenance, clothing and education," to be equivalent to: "for the benefit of the children."

1848.
LEWES v. LEWES.

Therefore I shall declare that the personal representative of the deceased child, is entitled to one-third of the 300*l.* a-year, during the life of the father. (*g*)

(*g*) See *Noel* v. *Jones*, *post*. 309.

SYMERS *v.* JOBSON.

1848: 15th June.

Construction. Will.

Testator gave one-third of his residue in trust for his sister, the interest to be paid to her during her life, and the principal, at her death, to go to *the heirs of her body, share and share alike.* The sister had five children living at the testator's death.

Held, from the context of the will, that she took for life, with remainder *to her children* as tenants in common.

THE bill stated that *John Crawford* made his will bearing date the 29th November 1817; and, thereby, after directing his debts to be paid and giving several legacies, and, among them, a legacy of 2000*l.* *£3 per Cent.* Reduced Annuities to his sister, Mrs. *Marion Jobson*, to be secured to her during her life, and, at her death, to go *to her children share and share alike*, he expressed himself as follows: "To my good friends, *John Trotter* and *Coutts Trotter*, Esqs., and to their executors, I leave all the residue of my property, to be by them held in trust for the purpose of paying my daughter, *Elizabeth Jane*, all the interest arising therefrom during her natural life. If she marries *and leaves issue*, one half of the said residue to be at her disposal at her death, to leave to whom she pleases; and the other half, on that event taking place, to go or belong to *the child or children of her body, share and share alike.* If she dies unmarried or, marrying, dies without leaving issue, then and in that case, the whole of the said residue to be divided as follows; one third part thereof to be at the disposal of my said daughter or as her will may direct; one-third to my sister, Mrs. *Marion Jobson*;

Re Jefferson; Trust 2 Law Rep. Eq. 280

1848.

SYMERS v. JOBSON.

of *Dundee, the interest to be paid to her during her life, and the principal, at her death, to go to the heirs of her body, share and share alike;* one-twelfth to my brother, *Charles Crawford*, and to the heirs of his body; one-twelfth to my niece, *Helen Mayne;* one-twelfth to Miss *Elizabeth Graham*, Mrs. *Mary Fletcher* and Lady *Scott* of *Ancrum*, share and share alike, and to their respective heirs; one-twelfth to be equally divided amongst all my cousins german now existing, or their representatives."

The bill further stated that the testator died on the 2nd of May 1818: that his daughter, *Elizabeth Jane Crawford*, died in November 1846, without having been married: that, at the testator's death, his sister, *Marion Jobson* had five children, that is to say, the Defendant *Helen Jobson*, the Plaintiff *Mary*, the wife of the Plaintiff *John Symers*, the Defendant *Marion Jobson*, and *Elizabeth Jobson*, who afterwards married the Defendant *Edward Baxter*, and died in 1842, and the Defendant *Anne Jobson* who intermarried with and was then the widow of *Robert Jobson* deceased: that *Marion Jobson*, never had any other child: that *Elizabeth Baxter* left her husband and two children only her surviving, namely the Defendants *Marion Crawford Baxter* and *Elizabeth Jobson Baxter*, who were infants: that *Marion Jobson*, the mother, was a widow at the death of the testator, and did not marry again after his death, and that she died on the 3rd July 1847, and left the Plaintiff *Mary Symers* and the Defendants, *Helen Jobson*, *Marion Jobson*, and *Anne Jobson*, and *Marion Crawford Baxter* and *Elizabeth Jobson Baxter*, her sole next of kin at the time of her death: that she died intestate, and the Plaintiff *Mary Symers* procured letters of administration of her estate and effects

to be granted to her. The bill charged that *Marion Jobson*, deceased, was, according to the true construction of the will, absolutely entitled to one-third part of the testator's residuary trust estate; and that the Plaintiff, *Mary Symers*, as her personal representative, was entitled thereto for the benefit of her next-of-kin: whereas all the Defendants, including *Edward Baxter*, (who had procured letters of administration of the estate and effects of *Elizabeth Baxter*, his late wife,) alleged that, according to the true construction of the will, *Marion Jobson* deceased, was entitled only to an estate for her life in the one-third of the testator's residuary trust-estate; and the Defendants *Helen Jobson*, *Marion Jobson* and *Anne Jobson* alleged that, subject to that life-estate, the one-third belonged to them and the Plaintiff *Mary Symers*, as being such of the children of *Marion Jobson* deceased as were living at her death; whereas *Edward Baxter* alleged that, in right of his wife, he was entitled to one-fifth of the said third of the testator's residuary trust-estate. The bill prayed that the rights and interests of the Plaintiffs and the Defendants, in the one-third of the testator's residuary estate might be ascertained and declared by the Court; and that the same might be distributed among such of the parties as should be found to be entitled thereto, according to their respective rights and interests therein; and that it might be declared that, according to the true construction of the will, *Marion Jobson* deceased, was absolutely entitled to the one-third.

Mr. *Bagshawe* for the Plaintiffs, cited *Crawford* v. *Trotter* (*a*), *Yearwood* v. *Yearwood* (*b*), *The Earl of Verulam* v. *Bathurst* (*c*), and 2 *Jarman* on Wills, 490.

(*a*) 4 Madd. 361.
(*b*) 9 Beav. 276.
(*c*) *Ante*, Vol. XIII. page 374.

1848.

SYMERS v. JOBSON.

Mr. *Stuart* and Mr. *Lewis*, appeared for the Defendants, *Helen Jobson*, *Marion Jobson* and *Ann Jobson*.

Mr. *Lewin* appeared for the Defendant *Edward Baxter*; and

Mr. *James Parker*, for the Defendants, the children of Mrs. *Baxter*, said that his clients came within the description of heirs of the body of *Marion Jobson* their grandmother; and that, under the bequest in question, *Marion Jobson*, took for life, with remainder to the heirs of her body, as purchasers.

The VICE-CHANCELLOR:

It seems to me that the testator has, himself, put a construction on his own words. He says, with respect to his daughter: "If she marries and leaves *issue*, one-half of the said residue to be at her disposal at her death, to leave to whom she pleases; and the other half on that event taking place, to go or belong to the *child or children of her body, share and share alike.*" And, in a still earlier part of the will, where he gives a legacy to his sister, Mrs. *Marion Jobson*, (the rights of whose issue are the subject of the present suit,) he directs the legacy to be secured to her during her life, and, at her death, to go *to her children, share and share alike.* My opinion therefore is that, by the words: "heirs of the body," in the bequest in question, he meant: 'children,' and that they took a vested remainder, expectant on their mother's death, as tenants in common; and, consequently, one-fifth of the funds in Court, which represent the share of the testator's residuary estate which Mrs. *Marion Jobson* was entitled to for her life, must be transferred to each of her surviving children, and the remaining one-fifth, to the Defendant *Edward Baxter*, as the personal representative of the deceased child.

JONES *v.* LORD CHARLEMONT.

1848:
28th June.

Railway Company. Jurisdiction.

The jurisdiction of the Court is not affected by the 9th & 10th Vict. c. 28, for facilitating the winding-up of certain railway companies.

THE bill was filed for the purpose of winding up the affairs of a railway company.

Mr. *Stuart* and Mr. *Shapter*; in support of a general demurrer to the bill, said that the Plaintiffs might have attained their object under the 9 & 10 Vict. c. 28, (to facilitate the dissolution of certain railway companies,) and that that Act had ousted the Court of its jurisdiction in cases which, like the present, were clearly within its operation.

Mr. *Bethell* and Mr. *Berkeley*, appeared to support the bill: but

The *Vice-Chancellor* said that they need not trouble themselves upon the point, and over-ruled the demurrer.

In re Powell's Trust 10 Hare 136.

1848:
28th and 29th June.

Annuity.
Interest.

After the death of a person who had covenanted to pay an annuity, a suit was instituted for the administration of his assets, pending which, the annuity became in arrear. The Court refused to allow interest on the arrears.

JENKINS *v.* BRIANT.

THE bill was filed in 1826. By an order, made on the hearing for further directions, the *Master* was directed to take an account of what was due, to the Plaintiff, for the arrears of an annuity, which the testator had covenanted to pay to him, and in respect of which he had been found to be a specialty creditor of the testator (*a*).

On the Cause coming on for further directions on the *Master's* report made in pursuance of that order, the Plaintiff claimed, *for the first time*, to be paid interest, on the arrears found due to him, from the several days on which they became due.

Mr. *Bethell* and Mr. *Cole*, his counsel, referred to *Hyde* v. *Price* (*b*), *Crosse* v. *Bedingfield* (*c*), and 3 & 4 Will. IV. c. 42, sect. 28 (*d*), but did not state any

(*a*) See *Jenkins* v. *Briant*, *ante*, Vol. VI. page 603.

(*b*) *Ante*, Vol. VIII. page 578.

(*c*) *Ante*, Vol. XII. page 35.

(*d*) That section enacts that, upon all debts or sums certain payable at a certain time or otherwise, the jury, on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest, to the creditor, at a rate not exceeding the current rate of interest, from the time when such debts or sums certain, were payable, if such debts or sums be payable, by virtue of some written instrument, at a certain time, or if payable otherwise, then from the time when demand of payment shall

special circumstance in support of the claim, except that a fund which had been paid into Court by the receiver in the Cause, and which was applicable to the payment of the arrears, had greatly accumulated since it was paid into Court.

Mr. *Rolt* and Mr. *Greene*, opposed the claim on behalf of one of the Defendants. They said that, in *Hyde* v. *Price*, a judgment had been obtained by the Plaintiff, and the decree directed an account to be taken of what was due to him for interest as well as principal: but, in the present case, no judgment had been obtained; nor did the bill pray for, or the order direct the *Master* to take an account of what was due, for interest, on the arrears of the annuity; and that the Plaintiff had never before claimed interest: that the Plaintiff could not avail himself of the Act of the 3 & 4 Will. IV. because he had not brought an action and obtained a judgment on the covenant; besides which, that Act was not imperative, but merely *empowered* a jury to allow interest in case they should think proper so to do: that, in *Crosse* v. *Bedingfield*, the point was not argued, consequently, neither that case, nor *Hyde* v. *Price* was any authority for allowing the claim: that no special circumstances existed in this case: that the Defendants had not deprived the Plaintiff of his remedies, or delayed him in enforcing them; and that the case fell within *Aylmer* v. *Aylmer* (*e*) and *Booth* v. *Leycester* (*f*).

Mr. *Stuart*, Mr. *James Parker*, Mr. *Teed*, Mr. *Willcock*, Mr. *Hallett*, Mr. *J. H. Palmer*, Mr. *Mackeson*, Mr. *White*, and Mr. *De Gex* appeared for the other

have been made in writing, so as such demand shall give notice, to the debtor, that interest will be claimed from the date of such demand until the term of payment.

(*e*) 1 Molloy, 87.

(*f*) 3 Myl. & Cr. 459.

1848.

JENKINS v. BRIANT.

Defendants. They cited *The Attorney-General* v. *Lord Carrington* (*g*), and *Martyn* v. *Blake* (*h*).

Mr. *Cole*, in reply:

I admit that, if the claim had been made, as it was in *Booth* v. *Leycester*, against the estate charged with the annuity,* it could not have been supported. But, that estate having been sold and the proceeds exhausted by persons having claims upon it prior to the Plaintiff's, we now claim payment of the amount of the arrears of the annuity, as a specialty debt, out of the general assets of the testator; and, in such a case, interest is always allowed on the debt. *Newman* v. *Auling* (*i*), *Gay* v. *Cox* (*k*), and *Creuze* v. *Hunter* (*l*).

The VICE-CHANCELLOR:

It is quite plain, from what the *Lord-Chancellor* said in *Booth* v. *Leycester*, that interest on the arrears of the annuity cannot be demanded: and, if it could, I am precluded from allowing it by what has taken place in the Cause. The order on further directions directed the *Master* to take an account of what was due in respect, merely, of the arrears of the annuity, and, the *Master* has made his report finding what was due in respect of those arrears; and his report has been confirmed. Therefore, unless I rehear the order on further directions, I cannot depart from it; and as that order still remains in force, I cannot do anything that is at variance with it.

(*g*) 6 Beav. 454.
(*h*) 3 Drury & Warren, 125.
(*i*) 3 Atk. 579.
(*k*) 1 Ridgeway's Parl. Cases, 153.
(*l*) 2 Ves. Jun. 157.

* The annuity was charged, by the testator, on his estate called the *Maudlin's Rents Estate*. See *ante*, Vol. VI. page 603.

Taylor v Frobisher 5 Bely. N.S. 198 Poole v Bott 11 Hare 37.
In re Morse's Settlement 21 Beav. 178. In re Emmet, Ex parte 13 [illegible]
re Pelli Trust 3 D. F. & J. 292.
Crayton v Wilkinson 3 App. Cas. 372

BERKELEY *v.* SWINBURNE.

1848: 1st July.

Vesting. Will. Construction.

Testator bequeathed his residue in trust for his mother for life, remainder in trust for the children of his two sisters, in equal shares as tenants in common and to be *vested interests in the sons at twenty-one, and in the daughters at that age or on marriage;* and if any of them should die under age or, as to the daughters, unmarried, then, as to the original shares *belonging* to the children so dying and the shares to which they might become entitled under the now-stating trust, in trust for the others of them, in equal shares, their executors, &c.; and in case no child should live to attain a vested interest in the trust funds, then in trust for the testator's next of kin. The testator then empowered the trustees, (but, during the life of his mother, with her consent,) to apply the whole or any part of the principal trust-monies to which the children of his sisters *should be entitled* under the trusts thereinbefore contained, for their advancement, notwithstanding they should be under age, or, as to daughters, unmarried: and he directed that, in case, at the death of his mother, any child who, under the trusts thereinbefore contained, might be entitled to any *vested or presumptive share or shares* of the trust-monies, should, if a son, be under age, or, if a daughter, under age and unmarried, the trustees should pay the interest of their shares to his sisters, for the maintenance of their children.

The testator's mother died a few months after him. His sisters had several children some of whom were born after the death of his mother. Held that the mother's death, was the period at which the shares vested (subject, however, to be divested) and consequently that the after-born children were not entitled to participate in the funds.

PAUL FRANCIS BENFIELD, Esq., the testator in this Cause, by his will dated the 21st of April 1827, gave his residuary real and personal estate to trustees, in trust to sell and convert the same into money, and to invest the proceeds in the usual securities, in their names, and to pay the interest and dividends to his mother for life; and after her decease to stand possessed of the capital: "In trust for all the children (if there shall be more than one) of my sisters, *Henrietta Sophia Berkeley* and *Caroline Martha Berkeley*, other than and exclusive of an eldest or only son of my said sisters respectively, or, if there shall be no son of either

1848.

BERKELEY v. SWINBURNE.

of them my said sisters, other than and exclusive of an only daughter of them, to take in equal shares as tenants in common, their respective executors, administrators and assigns, and *to be a vested interest or vested interests in a son or sons, on his or their attaining the age of twenty-one years, and in a daughter or daughters, on her or their attaining that age or being married;* and, in case any one or more of the said children, being a son or sons, shall die under the age of twenty-one years, or, being a daughter or daughters, shall die under that age without having been married, then, *as to the original share or shares* of the said trust-monies, stocks, funds, and securities *belonging to the child or children respectively who shall so die as aforesaid,* as also the share or shares thereof to which the same child or children respectively may become entitled under this present trust, in trust for the others or other of the said children, and, if more than one, to take as aforesaid, his, her, or their executors, administrators, and assigns; or, in case there shall be, originally, only one child of my said sisters other than and besides an eldest or only son of each of them, or other than and besides an eldest or only son of one of them and an only daughter of the other of them, then in trust for such only child, his or her executors, administrators, and assigns; but, in case there shall be no such child, or no such child who, being a son, shall attain the age of twenty-one, or, being a daughter, shall attain that age or be married, then in trust for the only son or only daughter of my said sister, *Henrietta Sophia,* and the only son or only daughter of my said sister, *Caroline Martha,* in equal shares and proportions as tenants in common, their respective executors, administrators, and assigns; but, in case there shall be no such only son, or no such only daughter of either of them my said sisters, or no such son or daughter *who shall live to attain a*

1848.

BERKELEY v. SWINBURNE.

vested interest in the said trust-monies, then in trust for the only child of the other of them my said sisters, his or her executors, administrators, and assigns; and, in case there shall not be any child of either of them my said sisters who shall live to attain a vested interest in the said trust-monies, stocks, funds, and securities, then in trust for my own next of kin, in a course of administration, considering me to have died intestate, and upon or for no other trust, intent, or purpose whatsoever."

"Provided always, and I do hereby further declare and direct that it shall be lawful for the trustees or trustee for the time being of this my will, during the life of my said mother with her consent, and, after her decease, at the request of my said sisters respectively, or of the respective guardians for the time being of the child or children of my said sisters respectively in case my said sisters shall respectively have departed this life, to apply, settle, or appropriate the whole or any part of the principal trust-monies to which, under the trusts hereinbefore contained, such child or children respectively *shall be entitled*, for or towards the advancement in the world or otherwise for the benefit of such child or children respectively, either by way of marriage portion, or in any other manner, and with and under such conditions and restrictions, or without any condition or restriction, as, to my said sisters respectively, or the said guardians respectively, shall seem expedient, notwithstanding such child or children respectively, being a son or sons, shall not have attained the age of twenty-one years, or, being a daughter or daughters, shall not have attained that age or have been married."

"Provided, also, that in case, at the death of my said mother, any child or children of my said sisters respect-

1848.

BERKELEY v. SWINBURNE.

but without prejudice to the question as to which of their children might be ultimately entitled to share in the funds. The question therefore arises, in what proportion the mothers are to divide the interest. And, in order to decide that question, it has become, incidentally, necessary to consider the construction of the will: but the order now made, will leave it entirely open to the children to raise, hereafter, any question they may think proper, as to their rights: for the present question is between their mothers only.

The terms of the will upon which the question arises are as follows: "Upon trust to pay, to my mother, *Mary Frances Benfield* and her assigns, for and during the term of her natural life, the interest, dividends and annual produce of the said trust-monies, stocks, funds and securities; and, from and immediately after the decease of my said mother, then, as to the said trust-monies, stocks, funds and securities, and the unapplied interest, dividends and annual produce thereof, in trust for all the children (if there shall be more than one) of my sisters, *Henrietta Sophia Berkeley* and *Caroline Martha Berkeley*, other than and exclusive of an eldest or only son of my said sisters respectively; or, if there shall be no son of either of them my said sisters, other than and exclusive of an eldest or only daughter of them, to take in equal shares as tenants in common, their respective executors, administrators and assigns." Now if the will had stopped here, there would have been no room for discussion: there could have been no doubt that the period of division or distribution, that is, the period at which the persons who were entitled to take in remainder, were to be ascertained, was the death of the tenant for life. But then the testator goes on to use these expressions, upon which the argument has been raised: "To be a

vested interest or vested interests in a son or sons on his or their attaining the age of twenty-one years, and in a daughter or daughters on her or their attaining that age or being married." Here he has declared that the interests shall not vest in the sons until they attain twenty-one, or in the daughters until they attain that age or marry, and, therefore the period of division would not have been the death of the mother, but the attainment of twenty-one by the eldest child.

It is necessary, however, to consider what the testator there meant by the word, 'vested;' whether he used it in its strict technical sense, or whether he did not mean, 'indefeasible.' He proceeds thus: "And in case any one or more of the said children, being a son or sons, shall die under the age of twenty-one years, or, being a daughter or daughters, shall die under that age without having been married, then, as to *the original* share or shares of the said trust-monies, stocks, funds and securities belonging to the child or children respectively who shall so die as aforesaid, as also the share or shares thereof to which the same child or children may, respectively, *become entitled* under this present trust, in trust for the others or other of the said children, and, if more than one, to take as aforesaid, his, her or their executors, administrators and assigns: or, in case there shall be originally only one child of my said sisters other than and besides an eldest or only son of each of them, or other than and besides an eldest or only son of one of them and an only daughter of the other of them, then in trust for such only child his or her executors, administrators and assigns: but, in case there shall be no such child, or no such child, being a son, shall attain the age of twenty-one years, or, being a daughter, shall attain that age or be married, then in trust for the only son or only daughter of my said sister *Henrietta Sophia*

1848.

BERKELEY v. SWINBURNE.

Berkeley, and the only son or only daughter of my said sister *Caroline Martha Berkeley*, in equal shares and proportions as tenants in common, their respective executors, administrators and assigns: but in case there shall be no such only son or no such only daughter of either of them my said sisters, or no such son or daughter who shall live to attain a vested interest in the said trust-monies, then in trust for the only child of the other of them my said sisters, his or her executors, administrators and assigns: and in case there shall not be any child of either of them my said sisters who shall live to attain a vested interest in the said trust-monies, stocks, funds and securities, then in trust for my own next of kin."

Now, in order to see what the testator meant by a vested interest, we will first turn to the provision which he has made for the maintenance of the children of his sisters after the death of the tenant for life. He has provided that in case, at the death of his mother, any child or children of his sisters respectively, who, under the trusts of his will, might be entitled to any vested or presumptive share or shares of the trust-monies, stocks, funds or securities, should not, being a son or sons, have attained the age of twenty-one years, or, being a daughter or daughters, have attained that age or be married, then the trustees or trustee for the time being of his will, should place out or continue at interest on the security or securities aforesaid, and, from time to time, call in and replace out the share or shares of each such child or children respectively, and pay the interest, dividends and produce of the share of each such child or children respectively, being a son or sons, during his or their minority or, being a daughter or daughters, during her or their minority and discoverture, unto his sisters respectively; or, in case of their deaths respectively, unto

the guardians for the time being of such child or children respectively, to be applied in and towards the maintenance and education of such child or children or otherwise for their respective use and benefit.

It is quite impossible, therefore, that the testator could have meant that the shares of the sons should not vest in them until they attained twenty-one, or that the shares of the daughters should not vest in them until they attained twenty-one or married. What he did mean was that, until those events happened, their shares should not be indefeasible. That such was his meaning appears also from the language which he has used when he gives over the shares of the children: for he calls them their original shares, and treats them as belonging to the children from the period of the death of the tenant for life. He declares: "that, in case any one or more of the said children, being a son or sons, shall die under the age of twenty-one years, or, being a daughter or daughters, shall die under that age without having been married, then, as to the original share or shares of the said trust-monies, stocks, funds and securities belonging to the child or children respectively who shall so die as aforesaid, as also the share or shares thereof to which the same child or children may become entitled under this present trust."

Then comes the advancement-clause, which clearly shows what the testator's intention was, if the prior part of the will had left any doubt upon it. By that clause he provides: "That it shall be lawful for the trustees or trustee for the time being of this my will, during the life of my said mother with her consent, and, after her decease, at the request of my said sisters or of the guardians for the time being of the child or

1848.

BERKELEY v. SWINBURNE.

children of my sisters respectively, in case my sisters shall have departed this life, to apply, settle or appropriate the whole or any part of the trust-monies to which, under the trusts hereinbefore contained, such child or children shall be entitled, for and towards the advancement in the world or otherwise for the benefit of such child or children respectively, either by way of marriage-portion or in any other manner, and with and under such conditions and restrictions, or without any condition, as, to my said sisters respectively or the said guardians respectively, shall seem expedient, notwithstanding such child or children respectively, being a son or sons, shall not have attained the age of twenty-one years, or, being a daughter or daughters, shall not have attained that age or have been married."

Now it was said that that provision is not sufficient to induce the Court to come to the conclusion that the vesting of the shares was to take place at the death of the tenant for life: and *Titcomb* v. *Butler* (*b*) was referred to in support of that proposition. But, in that case, there was a gift, in the first instance, at a future period: there was no gift at a previous period. The gift there was to the children, when and as they should attain twenty-one. Here there is a gift to the children at the death of the tenant for life. This case is the very reverse of that. There are many cases which shew that where gifts to children are not to take effect until a future period, all the children who come into *esse* before that period arrives, are to be let in. Here the original gift to the children, the gift over and the clauses for their maintenance and advancement, are, all of them, inconsistent and incompatible with the death of the

(*b*) *Ante*, Vol. III. page 417.

tenant for life not being the period of division. Another case cited by the counsel for *Henrietta Sophia Berkeley* was *Defflis* v. *Goldschmidt* (*c*). In that case, the Court would not interfere to cut down the generality of the gift, because the parties had a distinct gift under which they claimed.

Now there are two other cases, in one of which we have the authority of Lord *Eldon*, and, in the other, the authority of the present *Vice-Chancellor*, which will guide the Court in the present case. One of them is *Davidson* v. *Dallas* (*d*). In that case, the testator bequeathed to the children of his brother, 3000*l*., to be equally divided amongst them; and, if either of them should die before the age of twenty-one, their share to go to the survivor. Therefore it was exactly the same as the present case, with the exception that there was no tenancy for life. The decree, which had been taken without argument, declared that all the children of the testator's brother who should be born before the eldest child attained twenty-one, were equally entitled with the children who were born at the testator's death. So that, if that decree had stood, the case would have been an authority in favour of the claim made, in this case, by the lady who has the greater number of children. But the decree was appealed from; and Lord *Eldon* decided that only those children who were living at the death of the testator, were entitled to the fund, with a limitation over, if either of them should die before the age of twenty-one, to the survivors.

The other case is *Kevern* v. *Williams* (*e*). There there

(*c*) 1 Mer. 417.
(*d*) 14 Ves. 576.
(*e*) *Ante*, Vol. V. page 171.

1848.

BERKELEY v. SWINBURNE.

was a gift, for life, to the testator's wife, and, after her decease, to the grandchildren of the testator's brother, to be by them received when they attained the age of twenty-five. That case comes much nearer to this, than *Davidson* v. *Dallas* does. And the conclusion which the *Vice-Chancellor* came to on the question of remoteness being raised before him, was that it was not a gift to such grandchildren as should attain twenty-five, but a gift to the grandchildren who should be living at the death of the tenant for life, though it was not to be received until they attained twenty-five. The decisions in both those cases proceeded on the same principle, namely, that the period of division had arrived, though there was a subsequent provision which had the effect of taking away the shares on the happening of certain events; there must, however, be a previous vested gift to take away.

The conclusion which we have come to in this case, is that there is a gift upon the expiration of the tenancy for life; and, consequently, the sisters are entitled to the annual proceeds of the trust funds, in fifths; but without prejudice to the question as to what shares the children may eventually take.

The order made on the petition, declared that *Henrietta Sophia Berkeley* having four younger children only who were alive at the death of *Mary Frances Benfield*, widow, the tenant for life of the testator's residuary estate, and *Caroline Martha Berkeley* having one younger child only who was alive at the death of the tenant for life, they were entitled, until further order (but without prejudice to the question as to what child-

ren of either of them might be ultimately entitled to share in the testator's residuary estate,) to receive the dividends and interest which should, from time to time, become due and payable on the funds in Court; and that *Henrietta Sophia* was entitled to four-fifths, and *Caroline Martha*, to one-fifth of such dividends and interest.

Reg. Lib. A. 1834, fol. 1010.

1848: 1st July.

The Cause now came on to be heard for further directions.

It appeared that *Henrietta Sophia Berkeley*, had had ten younger children, three of whom were born before the death of the testator, and the fourth, within three months after that event; and that all the others were born after the death of the testator's mother, the tenant for life under his will: and that *Caroline Martha Berkeley* had only one younger child, and that that child was born before the testator's death. It further appeared that *Henrietta Sophia's* first younger child had died under age and without having been married; that the second was still alive and attained twenty-one in January 1847; and that the third had died under twenty-one and unmarried; and that the fourth was still alive but had not attained twenty-one.

Mr. *Bethell*, Mr. *Rolt*, Mr. *Piggott*, and Mr. *Messiter* for the surviving younger children, who were born before the death of the tenant for life, relied on the judgment of the *Lords Commissioners*, which they

1848.

BERKELEY v. SWINBURNE.

read from the shorthand-writer's note, and on *Davidson* v. *Dallas* (*f*), and *Kevern* v. *Williams* (*g*).

The VICE-CHANCELLOR:

The question before the *Lords Commissioners* appears to have been just the same as that now raised: but their Lordships made no declaration as to the rights of the children.

Mr. *Lowndes* and Mr. *Giffard* appeared for *Caroline Martha Berkeley*.

Mr. *Grenside*, for *Henrietta Sophia Berkeley*, cited *Clarke* v. *Butler* (*h*).

Mr. *Stuart*, Mr. *Pole*, and Mr. *Osborne* appeared for other parties.

Mr. *James Parker* and Mr. *Follett* for the children who were born after the death of the testator's mother, contended that, as those children came into *esse* before the period of distribution, namely, before a son had attained twenty-one or a daughter had attained that age or married, they were entitled to share in the trust funds; and that the word, 'entitled,' in the advancement-clause, might be fairly construed to mean: 'entitled presumptively:' and that, in the advancement-clause, the shares of the children were designated not as vested, but as vested *or presumptive*. They cited *Leake* v. *Robinson* (*i*), *Barrington* v. *Tristram* (*k*), *Balm* v.

(*f*) 14 Ves. 576.

(*g*) *Ante*, Vol. V. page 171.

(*h*) *Ante*, Vol. XIII. page 401.

(*i*) 2 Mer. 363.

(*k*) 6 Ves. 345.

Balm (*l*), *Titcomb* v. *Butler* (*m*), *Gardner* v. *James* (*n*), *Congreve* v. *Congreve* (*o*), *Andrews* v. *Partington* (*p*) and 2 *Jarman* on Wills, pages 85 and 86.

The VICE-CHANCELLOR:

The decision of the *Lords Commissioners* is conclusive upon the question; and I cannot overrule it.

Declare that the children of the testator's two sisters (exclusive of the eldest son of each) who were living at the death of *Mary Frances Benfield*, the tenant for life under the will, are the only children who became entitled, under the will, to the testator's residuary estate, and that they took *per capita*, but that the shares of such children, were subject to be divested in favour of the rest of the said children, in the event of any one or more of them, being a male or males, dying under twenty-one, or, being a female or females, dying under twenty-one and without having been married.

Reg. Lib. A. 1847, fol. 1745.

(*l*) *Ante*, Vol. III. page 492.
(*m*) *Ante*, Vol. III. page 417.
(*n*) 6 Beav. 170.
(*o*) 1 Bro. C. C. 529.
(*p*) 3 Bro. C. C. 401.

BURLEY *v.* EVELYN.

1848: 1st and 3rd July.

Will. Construction.

Testator bequeathed 5000*l.* in trust, to pay the interest to his nephew *John*, for life, remainder to *John's* first son for life, remainder, as to the principal, for the children of *John*; and for default of such issue to pay the interest to the second and other sons of *John* successively and to their respective issue; and, *for default of issue male of John*, to pay the interest to the testator's nephew *Charles* for life, &c. &c.

Held that the words in italics, did not mean: "if *John* shall never have a son," so as to make the limitation to *Charles* take effect by way of substitution, but that *that* and all the other limitations subsequent to the limitation to the first son of *John*, were void for remoteness.

GENERAL *EVELYN*, by his will dated the 30th of November 1781, devised all his messuages, lands and hereditaments in the county of *Surrey*, to trustees upon trust to sell the same, and, by and out of the money to arise thereby, upon trust, in the first place, to retain 5000*l.*, and to place the same out at interest on Government or land security in their names, and to pay the interest and dividends thereof to his nephew, *John Evelyn*, son of his then late nephew *Charles Evelyn*, for his life; and, after his decease, to pay such interest and dividends to the first son of *John Evelyn* lawfully begotten, for his life; and, after his decease, to pay the 5000*l.* to the child or children of such first son lawfully begotten, equally between them if more than one; and, for default of such issue, to pay the interest and dividends of the

---

Conversion.—Heir and Residuary Legatee.

Testator directed the trustees of his will to sell his real estates and retain 5000*l.* out of the proceeds, and to stand possessed of that sum in trust for *A.* for life, remainder in trust for *A.'s* son for life, with divers remainders over, all of which were void for remoteness. And he gave his personal estate, after payment of the legacies thereinafter given, and *the residue of the money to arise by the sale of his real estates* after making good the 5000*l.*, to *B.* *A.* died a bachelor. The testator's heir also died.

Held that the heir's personal representative was entitled to the 5000*l.*

1848.

BURLEY v. EVELYN.

5000*l.*, to the second, third and other sons of *John Evelyn* lawfully begotten, severally and successively, and to their respective issue lawfully begotten, in the same manner as to the issue of the first son of *John Evelyn*; and, *for default of issue male of John Evelyn*, upon trust to pay the interest and dividends of the 5000*l.* to the testator's nephew, *Charles Evelyn*, second son of his nephew *Charles*, for his life; and, after his decease, to pay such interest and dividends to the first son of *Charles Evelyn* lawfully begotten, for his life; and, after his decease, to pay the principal to the child or children of such first son lawfully begotten, equally between them if more than one; and, for default of such issue, to pay such interest and dividends to the second, third and other sons of *Charles Evelyn*, lawfully begotten, severally and successively, and to their respective issue lawfully begotten in the same manner as to the issue of the first son of *Charles Evelyn*; and, *for default of issue male* of *Charles Evelyn*, upon trust to pay the interest and dividends of the 5000*l.* to the testator's nephew, *Hugh Evelyn*, third son of his nephew, *Charles* for his life; and, after his decease to pay such interest and dividends to the first son of *Hugh Evelyn* lawfully begotten, for his life; and, after his decease, to pay the principal to the child or children of such first son lawfully begotten, equally between them if more than one; and, for default of such issue to pay the interest and dividends of the 5000*l.* to the second, third and other sons of *Hugh Evelyn* lawfully begotten, severally and successively, and to their several and respective issue lawfully begotten in the same manner as to the issue of the first son of *Hugh Evelyn*; and, for default of such issue, upon trust to pay the 5000*l.* to such persons as, under the testator's will, would be entitled to the residue of his estate. And the testator

1848.

BURLEY v. EVELYN.

willed that all his personal estate should be turned into money as soon as conveniently might be after his decease, and that, after discharging the legacies thereinafter given, the produce thereof, *with the residue of the money to arise by sale of his real estates* after making good the legacy of 5000*l.* should be divided equally between *Charles Evelyn*, *Hugh Evelyn*, *Martha Philippa Evelyn*, *and Louisa Evelyn*, the sons and daughters of his nephew *Charles*.

The testator died in August 1783, leaving Sir *Frederick Evelyn*, his heir. *Charles Evelyn*, the testator's great nephew, died, without issue, in April 1784. *John Evelyn* died in 1833 without having been married.

The bill prayed for a declaration that all the limitations of the 5000*l.* contained in the will, which were subsequent to the limitation in favour of the first son of *John Evelyn* for life, were void for remoteness; and that, on the death of *John* without having had a son, the 5000*l.* resulted to Sir *Frederick*, as the heir of the testator at the time of his death, and that it came to Sir *Frederick* as personal estate, and that, as he was dead, it belonged to his personal representative.

Mr. *Bethell*, Mr. *Rolt* and Mr. *Thomas Parker*, appeared for the Plaintiff.

Mr. *James Parker* and Mr. *Smythe* for the assignee of *Hugh Evelyn*, who was a bankrupt, contended that, throughout the will, the word, 'issue,' meant, 'child or children:' and that the words: "in default of issue male of *John*," and: "in default of issue male of *Charles*," were to be read respectively: "in case *John* shall have no son," and: "in case *Charles* shall have no

son;" and, as neither *John* nor *Charles* had had a son, the gift to *Hugh* was good, as being an alternative or substitutionary gift, and not a gift by way of remainder; but they admitted that if the gift to the first son of *John* had taken effect, all the subsequent gifts would have become inoperative, as being too remote: *Crompe* v. *Barrow* (*a*), *Leake* v. *Robinson* (*b*), *Fearne* on Remainders, 6th edition, p. 488; *Oakes* v. *Chalfont* (*c*), *Doe* v. *Lyde* (*d*), *Salkeld* v. *Vernon* (*e*), *Target* v. *Gaunt* (*f*), *Keene* v. *Dickson* (*g*), *Goodright* v. *Dunham* (*h*), *Morse* v. *Lord Ormonde* (*i*), *Ellicombe* v. *Gompertz* (*k*), *Murray* v. *Addenbrook* (*l*), *Higgins* v. *Dowler* (*m*).

Mr. *Temple* and Mr. *Brett* appeared for *Hugh Evelyn*, and

Mr. *Roundell Palmer*, Mr. *Renshaw*, Mr. *Bates*, Mr. *Goldsmid*, and Mr. *Phillips* for other parties.

The VICE-CHANCELLOR:

The only question is what is the true meaning of the words which the testator has used?

(*a*) 4 Ves. 681. See the judgment.

(*b*) 2 Mer. 363; see 393 and 394.

(*c*) Pollexfen, 38. Mr. *Parker* said that Mr. *Fearne* had omitted some important words in his statement of that case: and he read *Pollexfen's* report of it.

(*d*) 1 T. R. 593.

(*e*) 1 Eden, 64.

(*f*) 1 P. W. 431.

(*g*) 3 T. R. 495, cited, and 3 Doug. 313, *Roscoe's* edit.

(*h*) 1 Doug. 264.

(*i*) 5 Madd. 99, and 1 Russ. 382.

(*k*) 3 Myl. & Cr. 127.

(*l*) 4 Russ. 407.

(*m*) 1 P. W. 98; and 2 P. W. 694.

1848.

BURLEY v. EVELYN.

He has directed the trustees of his will, to sell his real estates, and, out of the monies to arise thereby, to retain the sum of 5000*l.*, and to place the same out at interest on Government or land security, and to pay the interest, and dividends to his nephew, *John Evelyn*, for his life; and, after his decease, to his first son, for life, and, after the decease of that son, to pay the principal to the child or children of that son, equally between them; and, for default of such issue, that is, the issue of such first son, to pay the interest and dividends to the second, third and other sons of *John Evelyn*, successively, and to their respective issue, in the same manner as to the issue of his first son: and, for default of issue-male of *John*, in trust to pay the interest and dividends to *Charles Evelyn* for life: and then the testator declares trusts in favour of *Charles's* first and other sons and their issue, similar to the trusts which he had previously declared in favour of *John* and his first and other sons and their issue: after which he says: "and, for default of such issue male of the said *Charles Evelyn*, in trust to pay the interest and dividends of the said principal sum of 5000*l.*, to my nephew, *Hugh Evelyn*, for his natural life." Now it was argued that the words: "in default of issue male of *John*," and the words: "in default of issue male of *Charles*;" are to be construed respectively: "in case *John* shall never have a son," and: "in case *Charles* shall never have a son." But that cannot be the meaning of the testator. He meant to describe the failure of some portion of the antecedent gifts, so as to let in other persons to take in remainder. There is no description of the solitary fact of there being no issue at all of *John*.

The cases that have been cited have turned on this:

1848.

BURLEY v. EVELYN.

namely, that it appeared, from the context of the instruments on which the question arose, that the words: "in default of such issue," meant the failure of issue at the death of the first taker. But there is nothing, in this will, which authorizes me to say that the words: "in default of issue male of *John*," mean a total failure of the issue of *John* or his sons at any particular time. But it is plain to me that the testator intended all the limitations in his will, after the limitation to *John* for life, to take effect as remainders. He has however, so expressed his intention that the law will not allow it to prevail. And I must declare that all the limitations of the 5000*l.* subsequent to the limitation of the first son of *John*, are void for remoteness: and that the personal representative of the late Sir *Frederick Evelyn*, who was the heir of the testator at his death, is entitled to that sum: for, when a testator carves a chattel interest out of his real estate, and makes it the subject of limitations which fail, it results to his heir, but with the character which the testator impressed upon it.

1848:
8th of July.

Costs.
Trustee.
Practice.

If a petition is presented under the 10th Geo. IV. c. 56, or under the 11th Geo. IV. & 1st Will. IV. c. 60, to have a person appointed to convey property in the place of a recusant trustee, the latter ought not to be served with the petition, and, if he is served, he will be entitled to his costs.

IN THE MATTER OF THE THIRD BURNT TREE BUILDING SOCIETY.

EX PARTE ARMSTRONG AND SHALLCROSS.

ONE *Clarke*, a trustee of property belonging to the Society, having refused to convey it to trustees appointed in his stead, a petition intituled as above and in 10th Geo. IV. c. 56, and 11th Geo. IV. & 1st Will. IV. c. 60, and other Acts of Parliament, was served upon him praying that a person named in it, might be appointed to convey the property on his behalf and that he might be ordered to pay the costs of the application.

Mr. *Torriano* supported the petition.

Mr. *Lloyd* appeared for *Clarke*, and asked for his costs.

The *Vice-Chancellor* said that, if the Society meant to proceed under the authority either of the 10th Geo. IV. c. 56, s. 15, or the 11th Geo. IV. & 1st Will. IV. c. 60, s. 8, they ought not to have served *Clarke* with the petition, or asked that he might pay the costs of it: and his Honour made the order, but directed the petitioners to pay *Clarke's* costs.

RACKHAM *v.* SIDDALL.

1848: 10th, 12th, and 13th July.

Trustee.

A person who assumes the character of a trustee, incurs the responsibility of a trustee.

Trust Estates. Will. Construction.

Testator devised all his real estates whatsoever and wheresoever, to *Grace T.*, her heirs and assigns, charged with 50*l.* to *J. W.* Held that estates of which the testator was a trustee, did not pass by the devise.

WILLIAM SPENCER, by his will dated in 1798, devised his estates unto and to the use of *William Thompson* in fee, in trust, to pay an annuity of 150*l.*, out of the rents, to his wife, *Mary Spencer*, long since deceased, and to pay the surplus to his daughter, *Catherine* the wife of *Benjamin Norton*, during the life of his wife; and he directed that, after the death of his wife, the estates should be and remain unto *Thompson*, his heirs and assigns, to the use of *Catherine Norton* and her assigns for her life, with remainder to the use of *Thompson* and his heirs, during her life, in trust to preserve contingent remainders, with remainder to the use of *Benjamin Norton* and his assigns, during his life, with remainder to the use of *Thompson* and his heirs, during the life of *Benjamin Norton*, in trust to preserve contingent remainders, with remainder to the use of all the children of *Catherine Norton*, as tenants in common in tail, with cross remainders, between or amongst them in tail, with remainder to the testator's cousin *Matthew Spencer* in fee: and the will contained a proviso that, in case *Benjamin* and *Catherine Norton*, or the survivor of them should be desirous that the whole or any part of the estates should be sold, it should be lawful for *Thompson*, his heirs or assigns, to sell the whole or any part thereof: and the testator directed that the proceeds of the sale should be laid out either in the purchase of other hereditaments, or upon good security, at interest, in the name of his said trustee; and that the hereditaments to be purchased should be conveyed to *Thompson*, his heirs and assigns to the uses thereinbefore declared

Life Association of Scotland v Siddal 3 D. F. & S. 77.
Aveline v Melhuish 2 D. J. & S. 288

1848.

RACKHAM v. SIDDALL.

concerning the estates thereby devised; and that the interest of the money to be placed out at interest, should be paid, by his said trustee, to the person or persons who, for the time being, would have been entitled to receive the rents of his estates, in case the same had not been sold; and that the principal money so to be placed out, should, after the decease of *Benjamin* and *Catherine Norton*, be equally divided amongst all such children as *Catherine Norton* might have at her decease, the shares of such children to be paid to them on their severally attaining twenty-one; but, in case any of them should atttain that age in the lifetime of either *Benjamin* or *Catherine Norton*, the payment of their shares was not to take place until after the decease of the survivor of *Benjamin* and *Catherine Norton*: and if *Catherine Norton* should not leave any child who should attain twenty-one, the testator directed that the principal money should be paid to *Matthew Spencer*.

The testator died in January 1799.

William Thompson accepted the trusts of the will.

In 1800, he, at the request of *Benjamin Norton* and *Catherine* his wife, sold part, and in 1802, a further part of the estates, and paid over the proceeds to *Benjamin Norton*; and *Norton* gave him bonds to indemnify him against any injury or damage which he, his heirs, executors or administrators might sustain in consequence of his having so done.

Catherine Norton had five children who attained twenty-one.

Thompson, by his will dated in 1805, devised *all his*

real estates, whatsoever and wheresoever, unto and to the use of *Grace Thompson*, her heirs and assigns, *charged with fifty pounds to his friend John Watson*; and he appointed *Watson* sole executor of his will, in trust for *Grace Thompson*. He died in 1806; and, the bill alleged that he left no assets for the payment of his debts; and that, *John Watson* having died intestate, there was, at the time when the bill was filed, no personal representative of *William Thompson*, and no person could be found to take out letters of administration to his estate.

By indentures of lease and release dated the 20th and 21st of October 1807, the release being made between *Grace Thompson*, who was therein described as *devisee in fee simple named in the will of William Thompson*, of the first part, *Benjamin Norton* and *Catherine* his wife, of the second part, *George Liddell*, of the third part and *William Liddell*, of the fourth part, in consideration of the sum of 6300*l.* therein expressed to have been paid by *George Liddell* to *Grace Thompson*, she, with the consent and approbation of *Benjamin Norton* and *Catherine* his wife, conveyed the part of *William Spencer's* estates which remained unsold, to *George Liddell*, his heirs and assigns.

Grace Thompson signed a receipt, on the back of the release, for the 6300*l.*; and, either paid that sum to *Benjamin Norton*, or permitted him to receive it; and, on the 11th of November 1807, he executed to her a bond, at the foot of which was written a condition, whereby, after reciting Spencer's will, the sale and conveyance to *George Liddell*, and that *Grace Thompson* had paid the 6300*l.*, to *B. Norton*, or permitted him to receive it, to be by him invested in the purchase of other lands, or on securities at interest, *pursuan*

1848.

RACKHAM v. SIDDALL.

to the directions of Spencer's *will;* it was declared that the bond should be void if *Benjamin Norton* should, at all times thereafter, indemnify *Grace Thompson*, her heirs, executors and administrators, against any injury or damage which she or they might sustain, for or by reason of her having paid the 6300*l.* to *Benjamin Norton* or permitted him to receive the same, or for or by reason of the loss or misapplication thereof; and from and against all actions, suits, charges, damages and expenses, claims and demands on account thereof respectively, or, in anywise, relative thereto, or to anything else which *Grace Thompson*, her heirs, executors or administrators *might do or cause to be done, as trustee under* Spencer's *will*, at the request of *Benjamin Norton* and *Catherine* his wife or either of them.

Benjamin Norton died in July 1837. *Grace Thompson* died in April 1843, having appointed the Defendant *Charlotte Siddall* her executrix. In December 1844, *Edward Spencer Norton*, one of the children of *Benjamin* and *Catherine Norton*, died intestate and in insolvent circumstances; and the bill alleged that no person could be found who was willing to take out administration to his estate.

In November 1838, *Catherine Norton* mortgaged her interest under *Spencer's* will, to the Plaintiffs for securing the payment of 478*l.* with interest. She died in July 1845, and *W. Rackham*, one of the Plaintiffs, obtained letters of administration to her estate.

The bill was filed against *Charlotte Siddall*, the personal representatives and the surviving children of *Benjamin* and *Catherine Norton*, and the personal representatives of their deceased children except *Edward Spencer Norton*,

and against the persons to whom or in whose favour the children had assigned or encumbered their interests under *Spencer's* will. It alleged that, during the life of *Catherine Norton*, no rents, dividends, interest or other annual produce, were ever paid either to her or to the Plaintiffs as her assignees: that the estates of *Grace Thompson* and *Benjamin Norton* were liable to account, to the Plaintiffs, for such rents, dividends, interest and annual produce as would have accrued, during the life of *Catherine Norton*, in case the proceeds from the sale of *Spencer's* estates had been invested pursuant to the directions of his will.

The bill prayed that *Spencer's* will might be established, and the trusts of it be performed under the direction of the Court; and that the rights of all parties interested under those trusts might be declared; that an account might be taken of the real estates devised thereby, and of the annual produce that would have arisen, during the life of *Catherine Norton*, from the proceeds of the estates sold by *William Thompson* in his lifetime, in case such proceeds had been invested pursuant to the directions of the will; and that the Defendants *William Spencer Norton* and *Octavius Green*, who were the executors and trustees of *Benjamin Norton's* will, might be decreed to answer, to the Plaintiffs, what, on taking the last-mentioned account, might be found due; and that an account might be taken of the annual produce that would have arisen, during the life of *Catherine Norton*, from the proceeds of the estates sold by *Grace Thompson* after the death of *William Thompson*, in case such proceeds had been invested pursuant to the directions of the will; and that *the Defendant Charlotte Siddall, the executrix of Grace Thompson*, and the said *William Spencer Norton* and *Octavius Green*, the executors and trustees of the will of *Benjamin Norton*, might be

1848.

RACKHAM v. SIDDALL.

decreed to answer, to the Plaintiffs, what, on taking the last-mentioned account, might be found due, and that, if *Charlotte Siddall*, and *William S. Norton* and *Octavius Green* should not admit assets for the purpose aforesaid, then that an account might be taken of the estates of *Grace Thompson*, and, so far as might be necessary, of *Benjamin Norton*, and that those estates might be applied, in a due course of administration, in payment of what should be found due to the Plaintiffs.

Charlotte Siddall, by her answer, submitted to the judgment of the Court, whether estates vested in *William Thompson* in trust, passed, by his will, to *Grace Thompson*.

The questions at the hearing of the Cause, were, whether, the devise, in *William Thompson's* will, of all his real estates whatsoever and wheresoever, to *Grace Thompson*, her heirs and assigns for ever, charged with 50*l.* to his friend *Watson*, passed estates of which he was a trustee; and, if it did not, whether the estate of *Grace Thompson* was answerable for the 6300*l.*, which she had paid to *Benjamin Norton* or permitted him to receive.

Mr. *Bethell* and Mr. *Lewin* for the Plaintiffs, and Mr. *Walker*, Mr. *Campbell* and Mr. *Rogers* for Defendants in the same interest; said that a devise of all a testator's real estates whatsoever and wheresoever, would, unquestionably, pass, to the devisee, the estates of which the testator was seised as a trustee, as well as those of which he was seised beneficially; and that the devise would have the same effect, notwithstanding it was followed by a charge of a sum of money in favour of a third person; for the charge must be attributed to the

estates of which the testator was seised beneficially. They added that the release of October 1807, and the receipt on the back of it, and the recitals and condition of the bond of indemnity, showed that, if the legal estate in the hereditaments which remained unsold at *William Thompson's* death, did not vest in *Grace Thompson*, she took upon herself to act and had acted as a trustee with respect to those hereditaments; and therefore she could not have said, if she had been living, nor could her personal representative say after her death, that she had not acted as a trustee; and, consequently, her estate was as clearly answerable for the 6300*l.*, as it would have been if the legal estate in the hereditaments had been vested in her upon the trusts of *Spencer's* will: and they asked the Court to declare that *Grace Thompson*, by paying the 6300*l.* to *Benjamin Norton*, had committed a breach of trust, and that her assets were liable to make it good, with interest from the decease of *Benjamin Norton*.

Mr. *Rolt* and Mr. *F. T. White*, for *Charlotte Siddall*, contended, first, that the devise in *William Thompson's* will, did not pass his trust-estates to *Grace Thompson*: *Barker* v. *Greenwood* (*a*): and, consequently, that the acts, which she was stated to have done, were a mere nullity, and her estate was not answerable for them; secondly, that if *Grace Thompson* had committed a breach of trust by doing those acts, *Catherine Norton* had consented to and acquiesced in them; and, therefore, the Plaintiffs who claimed under her, were not entitled to any relief in respect of them: *Vandebende* v. *Levingston* (*b*): thirdly, that some of the Defendants, though they were materially interested in the matters in ques-

(*a*) 4 Mees. & Wels. 421. (*b*) 3 Swans. 625.

1848.

RACKHAM v. SIDDALL.

tion, had not been brought before the Court in the regular way, but had been merely served with copies of the bill; and, lastly, that the Plaintiffs, ought to have procured some person to take out letters of administration to *William Thompson*, and to have made that person a party to the suit.

Mr. *Stuart*, Mr. *James Parker*, Mr. *K. Parker*, Mr. *Elmsley*, Mr. *Toller*, Mr. *Faber*, Mr. *Cole*, Mr. *Prior*, Mr. *Baggallay* and Mr. *Haynes*, appeared for the other parties.

Mr. *Bethell*, in reply, said that *Catherine Norton* consented to the sale of the hereditaments, but not to the application of the purchase-money; and that the Plaintiffs complained of the latter, but did not complain of the former: and that the Defendants who had been served with copies of the bill, would be as much bound by the decree and all the other proceedings in the suit, as they would have been if they had been served with subpœnas (*c*).

The VICE-CHANCELLOR:

It has been my opinion, ever since the publication of the case of *Lord Braybroke* v. *Inskip* (*d*) and some other cases that bear on the point, that, where a person having estates of his own and having also estates vested in him as a trustee, makes a devise in general terms which would be sufficient, at law, to pass all those estates, but couples that devise with something which necessarily leads to the inference that he was thinking only of his own property at the time he made the devise, the general

(*c*) See 25th General Order of August, 1841; Beavan's Ord. 171.

(*d*) 8 Ves. 417.

words of the devise do not operate to pass the estates which he held merely as a dry trustee. And it seems to me, in this case, where the testator has used these words: "I give and devise all my real estates whatsoever and wheresoever, unto and to the use of my sister *Grace Thompson*, her heirs and assigns for ever, charged with 50*l.* to my friend *Watson*," that his trust estates did not pass; because the 50*l.* was, in language, as much charged upon one part of his real estates, as it was upon the other: and it would be absurd to suppose that he intended an estate to be charged with the 50*l.* which he had no power to charge at all.

Then, inasmuch as *Grace Thompson* was not, in reality, a trustee, but did those various acts, (about which there is no dispute,) which show that she assumed to herself the character of a trustee; and as she, solemnly, in writing, acknowledged that she was a trustee; and, as, when she was acting in that character, she enabled Mr. *Norton* to get possession of the money, which, if she had acted consistently with her assumed character, she ought to have otherwise disposed of, the question is whether she was not answerable and whether her representative is not answerable for the money?

Now I must say that it would be a most glaring violation of justice if I were to decide that she was not answerable. If she had pleased, she might have refused to act: but, as she assented to act, she was bound to act properly; and she cannot screen herself from the consequences of her acts, merely by saying that she was not authorized to act; the fact being that she voluntarily made herself an instrument, by means of which a fraud was committed upon those who, in her assumed character, she ought to have protected. And,

1848.

RACKHAM v. SIDDALL.

therefore, my opinion is that those who represent her are liable.

With respect to the objection that some of the Defendants have not been required to answer the bill, it is sufficient to say that they will be as much bound by the decree and other proceedings in the Cause, as they would have been if they had answered the bill.

Another objection was that the personal representative of *William Thompson* ought to have been made a party. But it appears that he left no assets; and, therefore, his personal representative would not aid the suit at all.

Declare that, *Grace Thompson* having permitted *Benjamin Norton* to receive the 6300*l.*, in the character which she assumed of a trustee under *William Spencer's* will, that sum ought to be made good out of her assets, with interest from the death of *Benjamin Norton*.*

* An appeal is pending before the Lord Chancellor.

RODNEY *v.* RODNEY.

1848: 20th July.

Stat. 3 & 4 *Will. IV.* c. 104. *Assets. Jurisdiction. Real Estates.*

The Court has jurisdiction to order the real estates of a deceased debtor to be sold for payment of his debts, in a suit instituted, not by a creditor of the deceased, but by a person interested in his estates under his will.

THE question which was decided in *Price* v. *Price*, reported *ante*, Vol. XV. page 484, was again discussed in this case: namely, whether, as the 3rd & 4th Will. IV. c. 104 (*a*), did not charge the real estates of a person deceased with his simple-contract debts, but merely made his heir and devisee personally liable for them, the Court could order his real estates to be sold for payment of those debts, in a suit instituted, not by a creditor of the deceased, but by a person interested in his estates under his will.

Mr. *Bethell* and Mr. *Giffard* appeared for the Plaintiff.

Mr. *Humphry* and Mr. *Nevinson*, for the Defendants who raised the question, cited *Calvert* v. *Godfrey* (*b*), *Horn* v. *Horn* (*c*), *Spackman* v. *Timbrell* (*d*), and *Ball* v. *Harris* (*e*).

Mr. *Stuart*, Mr. *James Parker*, Mr. *Bacon*, Mr. *Lovat*, Mr. *E. F. Smith*, Mr. *Dumergue* and Mr. *Karslake* appeared for the other Defendants.

The *Vice-Chancellor* pronounced a judgment which was substantially the same as his judgment in *Price* v. *Price*.

(*a*) To make freehold and copyhold estates assets for the payment of simple-contract debts.

(*b*) 6 Beav. 97.

(*c*) 2 Sim. & Stu. 448.

(*d*) *Ante*, Vol. VIII. page 253.

(*e*) 4 Myl. & Cr. 264.

Kinderley v Jervis 22 Beav. 21.

1848:
21st July.

Joint-tenancy. Survivorship.

At the death of a testator, two sums of stock, which had been purchased by him and his sister, were standing in their joint names. One had been purchased by them equally: but much the greater part of the other, had been purchased by the sister, who was still living.

Held that the sister was entitled, by survivorship, to both sums.

HARRIS *v.* FERGUSSON.

AT the death of the testator in this Cause, 6261*l.* Consols, and 4432*l.* 6*s.* 4*d.* Three-and-a-quarter *per Cents.*, were standing in the joint names of the testator and his sister, the latter of whom was a Defendant. The Consols had been purchased by them equally, but 4003*l.* 7*s.* 11*d.* of the Three-and-a-quarter *per Cents.* had been purchased by the sister, and the remainder by the testator.

The *Vice-Chancellor* said that, as the testator and his sister had contributed equally to the Consols, they had equally bought the right of survivorship; and that he did not see how he could decide otherwise with respect to the Three-and-a-quarter *per Cents.*; but he must take it that they contributed what they did contribute, for the purpose of creating a joint-tenancy: and, therefore, he should declare that the sister was entitled, by survivorship, to the whole of the Three-and-a-quarter *per Cents.* as well as to the whole of the Consols.

Mr. *G. L. Russell*, Mr. *Hore* and Mr. *John Stuart*, Jun., were the Counsel in the Cause.

Robinson v Preston 4 Kay & J. 515.

NOEL *v.* JONES.

1848:
28th July.

Legacy.
Will.
Construction.

Testatrix bequeathed her personal estate to trustees, in trust, amongst other things, to pay and apply 800*l.* in and upon the education of her godson, who was an infant. Held that the whole of the 800*l.* was payable at once, with interest from the end of the first year after the death of the testatrix.

THE testatrix in this Cause bequeathed her personal estate to trustees, in trust, amongst other things, to pay and apply the sum of 800*l.* in and upon the education of *Francis Noel*, the son of *Edward Noel* and her godson; it being, however, her desire that the trustees or the survivor of them, or the executors or administrators of such survivor, should follow all the reasonable suggestions of the said *Edward Noel*, as to the school and mode and style of learning in which he should desire to have his son educated; and to pay the residue of the monies which should remain after satisfying the purposes of the will, to the testatrix's son, *H. T. Montgomery*, his executors, administrators and assigns.

The bill was filed by *Francis Noel*, by his father as his next friend, against the executors of the will: it prayed that the Plaintiff might be declared to be absolutely entitled to the 800*l.*; and that the principal, with interest from the end of the first year after the testatrix's death, might be invested and properly secured for his benefit; and that all proper directions might be given for the application thereof and of the interest and dividends to arise therefrom, towards the maintenance and education of the Plaintiff, during his minority, as occasion should require.

The answer of the executors submitted that the Plaintiff was not absolutely entitled to the 800*l.* or to have the interest and dividends thereof applied for his mainte-

1848.

NOEL v. JONES.

nance and education during his minority; but that, according to the true construction of the will, that sum ought to be invested, and so much thereof as, from time to time, should be required for his education, ought to be sold out and applied for that purpose until the principal should be exhausted or the plaintiff should die; and that, in the mean time, the interest and dividends to arise from the principal, or from so much thereof as should, from time to time, remain invested, belonged to the testatrix's residuary estate; and that, in the event of the Plaintiff dying before the principal should be exhausted, the residue thereof then remaining unapplied, would also belong to the testatrix's residuary estate.

Mr. *Malins*, for the Plaintiff, said that the legacy vested in the Plaintiff, on the testatrix's death; and, therefore, interest was payable upon it from the end of the first year after that event; and that the authorities decided that, where a legacy was given for a particular purpose, the Court would disregard the purpose and hold that the legatee was entitled to the legacy absolutely. *Barton* v. *Cooke* (*a*), *Barlow* v. *Grant* (*b*), *Nevill* v. *Nevill* (*c*).

Mr. *Lloyd* and Mr. *Roundell Palmer*, for the Defendants, contended that, though the legacy might be vested, the time of payment had not arrived: that, the testatrix had not separated it from her personal estate, nor had she directed her executors to pay the whole of it at once; but had directed them to apply portions of it, *de*

(*a*) 5 Ves. 461.
(*b*) 1 Vern. 255.
(*c*) 2 Vern. 431. See also *Knox* v. *Lord Hotham*, *ante*, Vol. XV. page 82.

1848.

NOEL v. JONES.

anno in annum, for the education of her godson; and, consequently, no interest was payable upon it. *Crickett* v. *Dolby* (*d*), *Sidney* v. *Vaughan* (*e*).

Mr. *Malins* replied.

The VICE-CHANCELLOR:

It struck me, at first, that the words which the testatrix has used, made the 800*l.* payable by driblets; that is, that she intended her executors and trustees to pay, from time to time, such sums as, in the aggregate, should amount to 800*l.* But, on further consideration, I think that there is not so much particularity in the words, as to take the case out of the ordinary rule; which is that, where a legacy is given for the benefit of an infant in a particular mode, it must be taken to be a general legacy.

Therefore, I shall order the 800*l.* to be paid into Court, with interest from one year after the death of the testatrix, and shall give the Plaintiff liberty to apply, respecting it, as he may be advised (*f*).

(*d*) 3 Ves. 10.
(*e*) 2 Bro. P. C. 254.
(*f*) See *Lewes* v. *Lewes*, *ante*, 266.

1848:
28th and 29th July.

Costs.
Pauper.
Practice.

Although a Plaintiff dismisses his bill against a pauper Defendant, the practice is not to allow the Defendant more than pauper-costs.

RUBERY *v.* MORRIS.*

THE Defendant, after he had appeared to the bill, obtained an order permitting him to defend the suit *in formâ pauperis*. Whereupon the Plaintiff dismissed his bill. The order of dismissal directed the costs of the suit to be taxed and paid by the Plaintiff, and the *Taxing-Master*, in taxing them, to have regard to the order which the Defendant had obtained.

The *Taxing-Master* allowed the Defendant *pauper*-costs only.

The Defendant presented a petition, for a reference back to the *Master* to review his taxation.

Mr. *Rolt*, in support of the petition, cited *Roberts* v. *Lloyd* (*a*), *Rattray* v. *George* (*b*), and *Morgan* v. *Eastwick* (*c*).

Mr. *James*, for the Plaintiff, said that the practice in Equity was to allow a pauper, costs out of pocket only, though the practice at Law was otherwise. *Stafford* v. *Higginbotham* (*d*) and *Denn* v. *Russell* (*e*).

The *Vice-Chancellor* said that the Defendant had not

* *Ex relatione.*

(*a*) 2 Beav. 376.
(*b*) 16 Ves. 232.
(*c*) 7 Dowl. Pract. Cases, 543.
(*d*) 2 Keen, 147.
(*e*) 1 Dick. 427. But see *Wallop* v. *Warburton*, 2 Cox, 409.

dismissed the bill for want of prosecution, but the Plaintiff, himself, had dismissed his own bill; which was virtually an admission that he had no case against the Defendant: and, therefore, the *Taxing-Master* ought to have allowed the Defendant *dives* costs. His Honour added that, though he had directed the *Taxing-Master* to have regard to the order by which the Defendant had been admitted to defend the suit as a pauper, he meant to leave the whole matter open to the consideration of the *Master:* and he made an order according to the prayer of the petition.

The Plaintiff appealed, to the *Lord Chancellor*, from the *Vice-Chancellor's* order.

His Lordship, after hearing

Mr. *James* for the Plaintiff, and

Mr. *Rolt* for the Defendant, discharged the order appealed against; because the order dismissing the bill, did not direct the bill to be dismissed with costs, generally, but contained a special direction, to the *Taxing-Master*, to have regard to the order by which the Defendant was admitted to defend *in formâ pauperis*; and, therefore, the *Taxing-Master* could not have allowed the Defendant more than pauper-costs.

Mr. *Rolt* then moved that the order of dismissal might be varied by omitting the special direction.

Mr. *James*, *contrà*.

His Lordship said that, though he assented to the

1848.
RUBERY
v.
MORRIS.

proposition that the Counsel and Solicitor assigned to a pauper, gave their advice and assistance to the pauper and not to his adversary, he should not grant the motion until he had inquired into the practice.

Shortly before the Court rose for the day, his Lordship said that he had just received a certificate from the *Taxing-Masters*, who were unanimously of opinion that the practice was to allow a pauper Defendant, *pauper*-costs only.*

* According to the information which the Reporter obtained from the Counsel in the case and the Plaintiff's solicitor, his Lordship did not pronounce any *order*.

See the Report 1 H. & T. 400

1848:
29th July.

Sequestration. Reversionary interest.

A sequestration having issued against a Defendant, who was entitled to a *reversionary interest* in stock standing in the name of the *Accountant-General* in another Cause, the Court gave the sequestrators liberty to sell that interest.

COWPER *v.* TAYLOR.

A SEQUESTRATION having issued, in this Cause, against the Defendant *Taylor*, and he being entitled, in reversion expectant upon the decease of a lady, to two sums of stock which were standing in the name of the *Accountant-General*, in a Cause of *Taylor* v. *Cape*, the sequestrators moved that they might be at liberty to sell his interest in those sums.

The *Vice-Chancellor* made the order, saying that, as the funds were standing in the name of the *Accountant-General*, the Court had full dominion over them, and, virtually, was a trustee of them.

Mr. *Bethell* and Mr. *Kinglake* supported the motion.

Mr. *Stuart* and Mr. *Freeling* opposed it.

PEEL *v.* HAGUE.

1848:
3rd August.

Affidavits.
Practice.

A party who moves the Court to enlarge publication after having made an unsuccessful application to the *Master*, may read affidavits filed subsequently to the proceeding before the *Master*.

IN this case an application, by the Plaintiff, to enlarge publication, having been refused by the *Master*, the Plaintiff moved the Court for the same purpose.

The question was whether it was allowable for him to read affidavits, which had been filed since the application was made to the *Master*.

The *Vice-Chancellor* said that the 3 & 4 Will. IV. c. 94, s. 13, directed that an application to enlarge publication should be made, to the *Master*, in the first instance; and, if the *Master* did not grant the application, the Act allowed an appeal to the Court: that, on motions by way of appeal to the *Lord Chancellor*, affidavits made subsequently to the hearing of the original motion, were allowed to be read; and he did not see any reason why the same practice should not be allowed on appeals from the decision of the *Master*.

Mr. *Stuart* and Mr. *Toller* supported the motion.

Mr. *Bethell* and Mr. *Whitbread* opposed it.

1848:
3rd August.

Injunction. Production of documents. Practice.

Injunction granted, before answer, to restrain Defendants from parting with documents in their possession, belonging to the Plaintiff, and from preventing the Plaintiff and her solicitor from having access to the documents at all reasonable times and after reasonable notice.

GOODALE *v.* GOODALE.*

JOHN GOODALE by his will dated the 23rd of February 1842 gave, amongst other things, an annuity of 2000*l.* and a legacy of 500*l.* to the Plaintiff *Frances Goodale*, his wife, and two legacies of 6000*l.* each to the Plaintiff and his son, *John Goodale*, in trust for two of his daughters and their children, and all his real estates and the residue of his personal estate to his son absolutely, and appointed the Plaintiff and his son the executrix and executor of his will. The testator died in October 1845, and in May following the Plaintiff and his son proved his will. The latter was the acting executor, and possessed himself of the securities and other documents relating to the testator's estate, and they remained in his possession until his death. He died in April 1848. After his death the Defendant, *Mary Goodale*, his widow, and the Defendants, *Allen*, *Gawthorn* and *Sissons*, took possession of the securities and other documents relating to the personal estate of his father, and refused to deliver them up to the Plaintiff. And *Allen* and *Gawthorn*, shortly after his death, produced a writing which they alleged to be his will; but they were prevented from proving it by a *caveat* entered on behalf of the Plaintiff: and, when the bill was filed, the validity of the writing was the subject of a suit, in the Ecclesiastical Court, between them and the Plaintiff.

* *Ex relatione.*

The bill was filed in June 1848, and, after stating as above, and that some of the father's debts and legacies remained unpaid, and some of the trusts of his will, unperformed, it prayed that the Defendants might be decreed to deliver, to the Plaintiff, as the surviving executor and trustee of the will, all the documents in their custody or power relating to the father's estate, and that they might be restrained, in the mean time, from parting with those documents except to some person authorized by the Court to receive the same; and that, until such person should be appointed, the Defendants might be restrained not only from refusing to afford, but from interposing any impediment or hinderance against the Plaintiff and her solicitor, or either of them, having full and complete access to the documents, (at all reasonable times and after reasonable notice) with liberty for the Plaintiff and her solicitor or either of them to make copies thereof and extracts therefrom; and that, when the documents should be handed over to a person appointed by the Court to receive the same, such person might be ordered to retain them in safe custody, pending the suit in the Ecclesiastical Court, and until further order; and that the Plaintiff and her solicitor might have liberty to inspect them in the hands of such person and to make copies thereof and extracts therefrom; and, if necessary, that the Defendants might be ordered to deposit the documents in Court, forthwith, for safe custody until further order, with like liberty, to the Plaintiff and her solicitor, to make copies and extracts.

A motion, supported by an affidavit made by the Plaintiff and her solicitor, was now made for the injunc-

1848.

GOODALE v. GOODALE.

tion prayed for by the bill. The affidavit stated that the father's debts and legacies had not been fully paid, nor the trusts of his will performed; and that it was necessary that the Plaintiff, as the sole surviving executor and trustee of the will, should have immediate possession of the deeds, securities, accounts, books of account, papers and writings which related to the father's personal estate and were in the possession of *John Goodale*, the son, at his decease, in order that the same might be in safe and proper custody, and that the Plaintiff might be enabled to administer the estate of the father so far as it remained unadministered, and to perform the trusts of his will so far as they remained to be performed; and that, until the deeds, securities, &c., should be delivered to the Plaintiff, it was necessary that her solicitor should be permitted to inspect the same, for the purpose of enabling the Plaintiff to perform her duty as the surviving executrix and trustee of the will, by getting in the father's outstanding personal estate, paying his debts and legacies which still remained unpaid, and performing the trusts of his will.

Allen and *Gawthorn* made an affidavit in opposition to the motion, in which they stated that *John Goodale*, the son, made his will on the 16th of February 1847, and thereby devised part of his real estates to his wife for life, and gave the same, after her death, and all the residue of his real estates and all his personal estate to the deponents, and constituted them his trustees for the execution of his will, but did not, in any other manner, appoint them or any other persons executors thereof; and that they believed the will to be good and valid; that they, as the trustees thereof,

1848.

GOODALE v. GOODALE.

and being, as they were advised, the executors thereof according to the tenor thereof, took possession of the deeds, securities, documents, papers and writings which were in the possession of *John Goodale* the son at his death, but had not been able fully to examine and distinguish those which belonged to the estate of *John Goodale* the father, and those which belonged to the estate of his son, or to complete a schedule thereof; that the estate of the son, who was the residuary legatee of his father, was mainly interested in the preservation of the deeds, securities, &c., belonging or relating to the father's estate, and that the same were in safe custody, and that the deponents had never refused to deliver to the Plaintiff such deeds and papers as she might be ultimately found entitled to, but, on the contrary, they had informed her solicitor that all such deeds, securities, &c., as belonged to the estate of said *John Goodale* the father, and to which the Plaintiff, as his surviving executrix, was entitled, should, as soon as practicable, be selected and set apart, and delivered up to her: that they believed that the estate of *John Goodale* the father, was amply sufficient for the payment of such of his debts and legacies as had not yet been paid, and that there would be a considerable residue, and that no injury whatever had been or would be sustained by reason of the deeds, papers and writings belonging or relating to his estate not having been delivered over to the Plaintiff or her solicitor: that they had no doubt whatever that *John Goodale*, the son, was, up to the time of his death, in a perfectly sound state of mind, and that the most abundant evidence could be adduced to that effect: that neither of them had parted with, or intended to part with the possession

1848.

GOODALE v. GOODALE.

of any of the deeds, papers or writings relating to the estate of *John Goodale* the father, except to their solicitor for the purposes of the Cause, or by the order of the Court.

Mr. *Bethell* and Mr. *Webster*, in support of the motion, cited *King* v. *King* (*a*), *Atkinson* v. *Henshaw* (*b*), *Ball* v. *Oliver* (*c*), *Walker* v. *Walker* (*d*), *Lord Chedworth* v. *Edwards* (*e*), *Nutbrown* v. *Thornton* (*f*).

Mr. *Rolt* and Mr. *Lloyd* opposed the motion on the following grounds: that the documents were not in danger of being lost or destroyed: that the Defendants did not intend to part with them: and that it was contrary to the practice of the Court to allow a Plaintiff to inspect documents in the custody of a Defendant, before answer.

The *Vice-Chancellor*, without hearing the reply, said:

Nothing can be more plain than that it was the duty of *John Goodale* the son, not to allow any intermixture of the papers of his father with his own. That is the old principle of the Civil Law, and it has been always adopted in this Court; and, if any difficulty has arisen from the mixture of the papers, that is a difficulty from which the Plaintiff ought not to suffer; and if any bad consequences follow, they must fall on those who represent the son.

(*a*) 6 Ves. 172.
(*b*) 2 Ves. & Beam. 85.
(*c*) *Ibid.* 96.
(*d*) *Ibid.* 91, note.
(*e*) 8 Ves. 46.
(*f*) 10 Ves. 159.

1848.

GOODALE v. GOODALE.

Then it appears that the father appointed his wife and son his executors, and that his son died on the 1st of April last: and a question has been raised as to whether the Defendants *Gawthorn* and *Allen* were properly appointed executors of the son, or, in other words, whether the son's will was not invalid owing to the state of his mind. But I do not think that that alters the case at all. *Gawthorn* and *Allen* claim to act as the executors of the son; and they admit that they have, in their own possession, papers belonging to the estate of the father; and, therefore, they ought, immediately after the son's death, to have handed over those papers to the Plaintiff, whose sole property they then became.

Then it was said that there has been a difficulty in making out what papers belong to the father; but, though four months have elapsed since the son's death, it does not appear that the Defendants have made any attempt to ascertain which belong to the father and which belong to the son.

Now the object of the application is, in the first place, to prevent the parties who are in possession of the documents, from parting with them; and I think that there is no objection to granting that part of the application.

The next part of the motion is, in effect, that the Plaintiff may have access to the documents until the Court shall make a final order for the delivery of them to her: and I cannot but think that it would be a gross denial of justice, not to permit the Plaintiff, to whom alone the legal right to have the papers belongs, to inspect

1848.

GOODALE v. GOODALE.

them, from time to time, during the progress of the suit: and, therefore, I shall make an order in the terms of the notice of motion.

MEMORANDUM.

In the marginal note to *Flint* v. *Warren*, *ante*, page 124, line 12, the words, "real and," ought to have been omitted.

A report of *Langham* v. *The Great Northern Railway Company*, *ante*, page 173, has been published by Messrs. De Gex and Smale, during the printing of this Part.

Petre v Petre 1 Drewry 374.
Bree v Bishop 1 A. F. & S. 141.
Mullow v Begg 18 Eq. 248

GOUGH *v.* BULT.

1848:
4th August.

Interest.
Legacy.
Statute of Limitations.

A testator, who died in 1823, directed the trustees of his will to raise a legacy by sale of his real estates.

Held that the legatee was not barred by the 42nd sect. of the Statute of Limitations (3 & 4 Will. IV. c. 27) from claiming interest on the legacy from the end of the first year after the testator's death.

THE testator in this Cause, after bequeathing certain leasehold messuages to trustees in trust for his wife, ordered and empowered the trustees to sell so many and such of those messuages, so that his wife's income should, in no case, be reduced under 500*l.* a year, and to pay and apply such part of the monies to arise from such sale, not exceeding 2000*l.*, to each of his sons, *John* and *Samuel*, for setting them or either of them up in business, or for such other purposes as his wife should think proper and most beneficial for them.

The testator died in 1823: his son *John* died in 1832; and, the before-mentioned trust being wholly unperformed so far as it related to *John*, the bill was filed, in 1847, to have 2000*l.* raised, with interest, and paid to the Plaintiff, his personal representative. The Defendants, the executors and trustees of the will, put in a general demurrer to the bill; which the *Vice-Chancellor* overruled: and the *Lord Chancellor* affirmed his Honour's decision (*a*).

The Cause now came on to be heard. The only question was whether the Plaintiff was entitled to interest on the 2000*l.* from the end of the first year after the testator's death, or whether he was not barred, by the 42nd sect. of the Statute of Limitations, 3 & 4 Will. IV. c. 27, from claiming interest except for the last six years.

(*a*) See *ante*, page 45.

1848.

GOUGH v. BULT.

Mr. *Bethell* and Mr. *James*, for the Plaintiff, said that the 2000*l.* was to be raised under a trust, and that the Statute of Limitations had no application to cases of trust; *Ward* v. *Arch* (*b*), and *Young* v. *Lord Waterpark* (*c*).

Mr. *Stuart* and Mr. *Stinton* for the Defendants, said that, as the object of the suit was to have a legacy *raised*, the 42nd sect. of the Statute of Limitations applied: that, in *Phillipo* v. *Munnings* (*d*), the legacy *had been severed from the testator's estate*, and appropriated so as to constitute a trust-fund; and it was on that ground that the *Lord Chancellor* held that the statute did not apply: and they referred to the following passage in the judgment of *Vice-Chancellor Wigram* in *Francis* v. *Grover* (*e*): "Suppose the owner of an estate to acknowledge a sum of money to be lent to him, and to agree that certain specific lands shall stand charged with the payment of the money and interest. That is an express charge by contract. If that money is due in the form of a charge, then it is a case contemplated by the 42nd sect., in which a person having a charge cannot recover."

Mr. *Bethell*, in reply, said that if the testator had given the leasehold estates to his wife, charged with the payment of 2000*l.* to his son, the statute would have applied; but that the testator had bequeathed the estates to trustees, upon an express trust to sell them and pay the 2000*l.* out of the proceeds; and, therefore, the statute did not apply.

(*b*) *Ante*, Vol. XII. page 472.

(*c*) *Ante*, Vol. XIII. page 199. See page 204.

(*d*) 2 Myl. & Cr. 309.

(*e*) 5 Hare, 39. See 50.

The Vice-Chancellor:

1848.

Gough v. Bult.

I do not see how this case can be distinguished from *Ward* v. *Arch*; and, therefore, I shall declare that the Plaintiff is entitled to interest on the 2000*l.*, after the rate of 4*l.* *per cent.* from the end of the first year after the death of the testator.

HORNBY *v.* MATCHAM.

1848: 4th August.

Mortgagor and Mortgagee. Destruction of Deeds.

A mortgagee having inadvertently burnt the mortgage-deed and the documents relating to the title to the mortgaged estate, some of which were originals and others attested and office copies, was ordered, in a foreclosure-suit, not only to procure fresh attested and office copies, but to make compensation *for the damage done to the estate* by the destruction of the deeds, the amount to be settled by the *Master* and deducted from the mortgage-debt.

In 1840 a mortgagee of an estate for a term of years, whose mental faculties had been weakened by illness, burnt the mortgage-deed and the documents relating to the title to the mortgaged estate, some of which were attested copies and others, originals. In 1841, the mortgagor, at the request of the mortgagee, executed a deed by which, after reciting the mortgage-deed from a draft of it, and that the original had been lost or destroyed, he acknowledged that it corresponded, in form, substance and effect with the recital of it therein contained. These facts were stated in a bill filed by the executors of the mortgagee, to foreclose the mortgage, and were found by the *Master* in pursuance of the decree at the hearing of the Cause.

On the Cause coming on for further directions,

Mr. *Bethell* and Mr. *Lewin*, for the Defendant, asked that the Plaintiffs might be ordered to procure fresh attested copies in lieu of those that had been destroyed, and also an office-copy of certain letters of administra-

Ld Middleton v Elist. 15 Sim 531
Brown v Sewell 11 Hare 51.

1848.

HORNBY v. MATCHAM.

tion with a will annexed, in lieu of the original letters of administration, which had been delivered to and destroyed by the mortgagor, and also that the *Master* might be directed to ascertain what would be a sufficient compensation *for the damage sustained by the mortgagor, in consequence of the destruction of the deeds and other documents* found by the *Master* to have been destroyed, and that the amount of the compensation to be so ascertained might be set off against the principal and interest due on the mortgage, and that the costs of the suit might be paid by the Plaintiffs.

Mr. *Teed* and Mr. *Renshaw*, for the Plaintiffs, said that their clients were willing to procure the attested and office copies, but were not bound to make compensation for the damage sustained by the mortgagor in consequence of the destruction of the deeds: and they referred to *Stokoe* v. *Robson* (*a*) and *Shelmardine* v. *Harrop* (*b*).

Mr. *Bethell* said that, in those cases, the deeds had been stolen from the mortgagee; but, in the present case, they had been destroyed by the wilful act of the mortgagee.

The VICE-CHANCELLOR:

It is clear, to my mind, that some damage has been done to this estate by the destruction of the deeds and other documents, in addition to that which will be repaired by the furnishing of the fresh attested and office-copies: for, in all future dealings with the estate, the decree and other proceedings in this suit will, necessarily, form part of the title; and the procuring office-copies

(*a*) 3 Ves. & Beam. 51. (*b*) Madd. & Geld. 39.

of those proceedings, will be attended with an expense; for which, I think, compensation ought to be made.

The following order was drawn up: "Refer it to the *Master* of the Court, to whom this Cause stands referred, to take an account of what is due, to the Plaintiffs, for principal and interest on their mortgage-security in the pleadings mentioned; and order the *Master* to ascertain what ought to be allowed as a sufficient compensation for the damage done, to the estate in question, by the destruction of the deeds as found by his report; and the amount of what the *Master* shall find to be proper to be allowed for such compensation as aforesaid, is to be set off against what shall be found due for such principal and interest: and upon the Defendants paying, to the Plaintiffs, what shall be reported due to them for such principal and interest after deducting, therefrom, the amount of such compensation as aforesaid, within six months after the *Master* shall have made his report, at such time and place the *Master* shall appoint, it is ordered that the said Plaintiffs do reconvey the mortgaged premises, &c., and do deliver up all deeds and writings in their custody or power, and also office-copies of the letters of administration and attested copies of the deeds found, by the *Master*, to have been destroyed, upon oath, to the said Defendants or to whom they shall appoint: but in default of the said Defendants paying, to the Plaintiffs, such principal and interest as aforesaid, by the time aforesaid, it is ordered and decreed that the said Defendants do stand absolutely debarred and foreclosed of and from all right, title, interest and equity of redemption of in and to the said mortgaged premises.* M. 2. Hare 44.

* Reg. Lib. A. 1847, fol. 2321 b. The above order contained

1848.

HORNBY v. MATCHAM.

The *Master*, by his report made in pursuance of the above order, stated that the estate comprised in the mortgage-security, was estimated to be of the value of 20,000*l.* and upwards; and that the Defendants had proposed the sum of 500*l.* as a proper sum to be allowed as a compensation for the damage done, to the estate, by the destruction of the deeds: and, upon consideration of the state of facts which had been laid before him on the part of the Defendants, and of the said proposal, and having regard to the value of the estate and the amount of the mortgage-money (which was 9295*l.* 8*s.* 8*d.*) and also to the difficulty and expense which might be occasioned, to the owner of the estate, by the destruction of the deeds, on any occasion of selling or mortgaging the estate or any part of it, he approved of the proposal, and was of opinion that the sum of 500*l.* was a proper sum to be allowed as such compensation as aforesaid.

---

no direction as to the costs of the suit, because, as the Reporter was informed, the parties had, privately, made some arrangement respecting the payment of them.

WALKER *v.* THE MARQUIS OF CAMDEN.

1848: 8th August.

Construction. Will. "Legal Representative or Representatives."

The words: "legal representative or representatives," in a will, held to mean, not: "executors or administrators," but: "next-of-kin."

THOMAS PALMER, by his will dated the 29th of March 1788, gave an annuity of 100*l.* to his wife, and charged all his estates with the payment of it: and he also gave to her all the plate that was her property before her marriage with him, and all the goods, chattels and effects then being in and about his house in Northumberland Court, in the Strand, to and for her own sole, private use and benefit: and, subject to the annuity, he gave devised and bequeathed all the rest, residue and remainder of his estates and effects whatsoever, both real and personal, to his brother, *Anthony Palmer*, and to *Walter James James* and *William Day* upon this special trust and confidence in them reposed, that they, or the survivors or survivor of them, or the heirs, executors or administrators of such survivor, should, from time to time during the life of his son, *William Palmer*, manage and transact all his affairs in such way and manner as they, or the survivors or survivor of them, or the heirs, executors or administrators of such survivor, should, in their discretion think best, either by purchase of freehold or other lands, tenements or hereditaments, or by placing the same out upon Government or other securities, or otherwise, in their discretion, for the benefit and advantage of his said son, and should pay, apply and dispose of, as well the rents, issues and profits, as also the interest, dividends and proceeds of such estates, monies and effects, to and for the sole and only use and benefit of his said son, for and during the term of his natural

1848.

WALKER v. THE MARQUIS OF CAMDEN.

life, in such way and manner as they, his said trustees or the survivors or survivor of them, or the heirs, executors or administrators of such survivor, should, in their discretion, think most prudent; and upon further trust that they, his said trustees, or the survivors or survivor of them, or the heirs, executors or administrators of such survivor, should, in case his said son should happen to marry and leave any child or children, stand and be possessed of all and singular such estate, monies and effects, to and for the only use benefit and advantage of such child or children, and his, her or their heirs, executors or administrators; and upon this further trust and confidence that, if his said son should happen to die without having been married or without leaving any child or children, his said trustees, or the survivors or survivor of them, or the heirs, executors or administrators of such survivor, should sell and dispose all his said estates, and the money arising therefrom and also all other monies and effects, whatsoever, which should then belong to the trust estate, should divide and pay, in four equal parts or shares, in manner following, that is to say, one equal fourth part or share thereof to his nephew *Anthony Palmer*, if he should be then living, and, if not, then *to his legal representative or representatives;* one other equal fourth part or share thereof, to his niece, *Mary King*, widow, if she should be then living, and, if not, then to her legal representative or representatives; one other equal fourth part or share thereof, to his niece, *Susannah Lewington*, if she should be then living, and, if not, to her legal representative or representatives; and the remaining fourth part or share thereof to his niece *Mary Ann Palmer*, if she should be then living, and, if not, then to her legal representative or representatives: and he appointed his

brother, *Anthony Palmer*, and *Walter James James* and *William Day* joint executors of his will.

The testator died shortly after the date of his will. His nephew *Anthony Palmer* died in 1815. *Susannah Lewington* was his executrix; and *Elizabeth King* and *Ann King* were his sole next of kin. *William Palmer*, the testator's son, died in June 1844, without having been married.

At the hearing of the Cause for further directions, the question was whether the words "legal representative or representatives," meant "executor or executors," or "next of kin according to the Statutes of Distribution." *Corbyn* v. *French* (*a*), *Price* v. *Strange* (*b*), *Taylor* v. *Beverley* (*c*), *The Attorney-General* v. *Malkin* (*d*), and *Holloway* v. *Clarkson* (*e*) were cited in support of the former construction; and *Horsepool* v. *Watson* (*f*), *Long* v. *Blackall* (*g*), *Bailey* v. *Wright* (*h*), *Daniel* v. *Dudley* (*i*), *Palin* v. *Hills* (*k*), *Walter* v. *Makin* (*l*), *Nicholson* v. *Wilson* (*m*), *Buckle* v. *Fawcett* (*n*), and *Bridge* v. *Abbot* (*o*), in support of the latter.

The Counsel in the Cause were Mr. *Bethell*, Mr. *James Parker*, Mr. *Bagshawe*, Mr. *Heathfield*, Mr. *Shee*, Mr. *Shebbeare*, Mr. *Faber*, Mr. *Fleming* and Mr. *Taylor*.

(*a*) 4 Ves. 418.
(*b*) Madd. & Geld. 159.
(*c*) 1 Coll. 108.
(*d*) 2 Phill. 64.
(*e*) 2 Hare, 521.
(*f*) 3 Ves. 383.
(*g*) Ibid. 486.
(*h*) 18 Ves. 49.
(*i*) 1 Phill. 1.
(*k*) 1 Myl. & Keen, 470.
(*l*) *Ante*, Vol. VI., page 148.
(*m*) *Ante*, Vol. XIV., page 549.
(*n*) 4 Hare, 536.
(*o*) 3 Bro. C. C. 224.

1848.

WALKER v. THE MARQUIS OF CAMDEN.

The VICE-CHANCELLOR:

The testator has used the words "executors or administrators," five times in his will: therefore, it would be singular to say that, where he departs from those words and uses the terms "legal representative or representatives," he meant "executors or administrators." It appears to me that he used the words "executors or administrators" with a knowledge of their import; and that, when he used the terms "legal representative or representatives," he did not mean "executors or administrators;" therefore those terms must, of necessity, mean next-of-kin.

Declare that, *Anthony Palmer* having died in the lifetime of the testator's son *William Palmer*, his next-of-kin, at his death, are entitled to the share of the testator's trust estate, which he would have taken if he had survived *William Palmer*; and that they take as joint-tenants.

NEVILLE *v.* FORTESCUE.

1848:
8th August.

Tenant for Life and Remainderman. Enjoyment in Specie. Long Annuities. Will. Construction.

JAMES LORD *GLASTONBURY*, by his will dated the 21st of January 1824, after giving several legacies and annuities and charging his personal estate only with the payment of certain of the legacies, and his estates in *Lincolnshire* only with the payment of the annuities, expressed himself thus:

"And, subject to the payment of the already mentioned legacies as already mentioned and of my just debts, I give and devise all the real estates of which I am seised, possessed or entitled to, in law or equity, in possession, reversion, remainder or expectancy, *and all my personal property of what nature or kind soever which I may die possessed of or entitled to*, as follows: *Imprimis*, for and concerning all my manors, lands, tenements, advowsons and hereditaments in the counties of *Somerset*, *Surrey* and *Bedford*, to the use of my cousin, The Right Honourable *Thomas Grenville*, and his assigns during his natural life; and, after the determination of that estate by any means during his lifetime, to the Earl *Fortescue* and *Richard* Lord *Braybrooke* and their heirs during the life of the said *Thomas Grenville*, in trust to support and preserve the contingent

Testator having devised his real estates in strict settlement, bequeathed his personal estate, in trust, as far as the nature of it would admit, for the persons who, for the time being, might have the ownership and be in the possession of his real estates under the limitations of his will; and then directed that those persons, *under letters of attorney and powers from the trustees (which he empowered and required them to grant) should receive the yearly dividends which might arise out of the public or other funds, and the yearly interest which might arise from other parts of his personal property*, under the same restrictions and limitations and to the same extent on which they held his real estates.

Held that the testator's personal estate was to be enjoyed *in specie*, notwithstanding it consisted, in part, of Long Annuities and Bank Stock.

1848.

NEVILLE v. FORTESCUE.

uses and estates hereinafter limited from being defeated or destroyed, and, for that purpose, to make entries and to bring actions as occasion may require, but in trust for the said *Thomas Grenville* and his assigns; and, after the decease of the said *Thomas Grenville*, to the first and every other son of the said *Thomas Grenville* lawfully begotten or to be begotten, successively, according to priority of birth, in tail male; and, in default of such issue, to the use of the Honourable and Reverend *George Neville*, second son of Lord *Braybrooke*, and his assigns during his natural life; and, after the decease of the said *George Neville*, to the use of *Ralph Neville*, eldest son of the said *George Neville*, and his assigns during his natural life; and, after the decease of the said *Ralph Neville*, to the use of the first and every other son of the said *Ralph Neville* lawfully begotten or to be begotten, successively, in tail male, according to priority of birth; and, in default of such issue, to the use of *Frederick Neville*, second son of the said *George Neville*, and his assigns during his natural life; and, after the decease of the said *Frederick Neville*, to the use of the first and every other son of the said *Frederick Neville* lawfully begotten or to be begotten, successively, in tail male, and according to priority of birth; and, in default of such issue, to the use of the other sons of the said *George Neville* lawfully begotten or to be begotten, successively, in tail male, according to priority of birth; and, in default of such issue, to the Honourable *George Fortescue* during his natural life; and, after the decease of the said *George Fortescue*, to the use of the first and every other son of the said *George Fortescue* lawfully begotten or to be begotten, successively, in tail male, according to priority of birth; and, in default of such issue, to the use of the Honourable and Reverend *John Fortescue* and his assigns during his life; and, after the

1848.

NEVILLE v. FORTESCUE.

decease of the said *John Fortescue*, to the use of the first and every other son of the said *John Fortescue* lawfully begotten or to be begotten, successively, in tail male, according to priority of birth; and, in default of such issue, to the use of the Right Honourable *Charles Watkin Williams Wynne* and his assigns during his natural life; and, after the decease of the said *C. W. W. Wynne*, to the use of the first and every other son of the said *C. W. W. Wynne* lawfully begotten or to be begotten, successively, in tail male, according to priority of birth; and, in default of such issue, to the use of the Right Honourable *George Grenville* Baron *Nugent*, his heirs and assigns for ever. And it is my will and meaning and I do hereby direct that, in case the said *George Neville* or his sons shall become entitled to the honours and succeed to the estates of the said Lord *Braybrooke*, his father, the devise of the estates made by this my will in his and their favour shall cease and be void, and, in that case, I give, devise and bequeath my estates hereby devised to them, to the use of the said *George Fortescue* as hereby directed; and, in case the said *George Fortescue* shall become entitled to the honours and succeed to the estates of Earl *Fortescue*, his father, the devise of my estates made by this my will in his favour shall cease and determine; and, in that case, I give, devise and bequeath my estates so devised to the said *George Fortescue*, to the use of *Charles Watkin Williams Wynne* as hereby directed; and, in case the said *C. W. W. Wynne* shall become entitled to the honours and succeed to the estates of his brother, Sir *Watkin Williams Wynne*, Bart., the devise of my estates so made to the said *C. W. W. Wynne* shall cease and be void, and, in that case, I give and devise my estates so devised to the said *C. W. W. Wynne*, to the use of the said *George Grenville* Baron *Nugent* and

1848.

NEVILLE v. FORTESCUE.

his heirs for ever. And, as for and concerning my manors, lands, advowsons and hereditaments in the county of *Lincoln*, I give to the Honourable *Catharine Neville* an annuity or rent-charge of 300*l.*; which annuity is to commence from and after my decease, and, on the death of the said *Catharine Neville*, the said annuity is to cease and determine; and I direct that this annuity shall be charged upon and payable out of my estate in the county of *Lincoln*, upon the several quarterly days of payment of rents: and, charged with the payment of this annuity and such other annuities as I have already by this my will given or may hereafter direct, I give and bequeath all my estates in the county of *Lincoln* to the use of my cousin, the Reverend *William Smyth* jun., eldest son of the Reverend *William Smyth* and his assigns during his natural life; and, after the determination of that estate by any means in his lifetime to the use of the said *William Smyth*, the father, and of *Theophilus Harneis*, Esq. and their heirs during the lifetime of the said *William Smyth* jun., in trust to preserve and support the contingent uses and estates hereinafter mentioned from being defeated and destroyed, and, for that purpose, to bring actions or to make entries as occasion may require, but in trust for the said *William Smyth* jun. or his assigns; and, after the decease of the said *William Smyth* jun., to the use of the first and every other son of the said *William Smyth* lawfully begotten or to be begotten, in tail male, successively, according to priority of birth; and, in default of such issue, to the use of the said Reverend *William Smyth*, the father, and his heirs for ever. And I give to the said *William Smyth*, the father, and to the said *Theophilus Harneis*, 200*l.* each, provided they accept the trust conferred on them by this my will; with the payment of which I charge my estates in the county of *Lin-*

coln only. I hereby nominate and appoint the Right Honourable *Thomas Grenville* and the Honourable and Reverend *George Neville* joint executors of this my will. * * * * And, *for and concerning all the personal property of which I may die possessed, of whatever nature, kind or quality soever the same may consist*, or which I may be entitled to, whether in the public funds *or elsewhere*, after the legacies with which I have already charged it by this my will or may hereafter, by any codicil, charge it with, are discharged, I hereby give and grant to *Hugh* Earl *Fortescue* and *Richard* Baron *Braybrooke*, the trustees, appointed by this my will, of all my estates in the counties of *Somerset*, *Surrey* and *Bedford*, the same personal property, in trust, *as far as the nature of such property will admit*, for the persons who, for the time being, may have the ownership and be in the possession, under the limitations and restrictions of this my will, of the said estates: and I hereby direct that the said persons, *under letters of attorney and powers from the said trustees, who are hereby empowered and required to grant the same*, shall receive *the yearly dividends* which may arise out of the public or other funds, *and the yearly interest* which may arise from other parts of my personal property, under the same restrictions and limitations *and to the same extent* on which they hold my said estates in the counties of *Somerset*, *Surrey* and *Bedford*: and I do hereby empower my said trustees to sell my estate called *Leith Hill*, in the county of *Surrey*, with the consent of the person who may be under this my will, for the time being, in the possession of such estate, if thought advisable by him and them, on condition however that the money arising from the sale thereof shall be vested in the purchase of other freehold lands contiguous to my estates in the parish of *Butleigh*, as far as may be practicable and

1848.

NEVILLE v. FORTESCUE.

convenient; and I direct that, till such opportunity shall arise, the said money arising from this sale, shall be vested, in the names of my said trustees, *in one of the public funds;* and I do hereby direct that they shall, from time to time, pay *the yearly dividends* arising from such money, to the person who may be, for the time being at the time of the sale, in possession, under this my will, of the said estate."

The testator died, in April 1825, possessed of large sums in the £3 per Cents. and other permanent stocks, and of 927*l.* Long Annuities and 2000*l.* Bank Stock: and all those sums were suffered to remain *in specie,* and Mr. *T. Grenville,* who died in 1846, received the income of them.

The bill was filed, after Mr. *Grenville's* death, by *Ralph Neville's* eldest son, who was an infant. It stated that the Plaintiff was the first tenant in tail *in esse* under the limitations in the will, and, as such, was entitled to the testator's residuary personal estate, subject only to the preceding life-interests therein of his grandfather and father: and it insisted that the Long Annuities and Bank Stock ought not to have been suffered to remain *in specie,* but ought to have been converted into money at the end of one year after the testator's death, and that the proceeds ought to have been invested in the purchase of £3 per Cent. Consols: and it prayed that it might be declared that Mr. *Grenville* was not entitled to enjoy the Long Annuities and Bank Stock, *in specie,* and that his estate was liable to make good, to the trustees of the testator's residuary personal estate, the excess received by him for the dividends and annual income of the Long Annuities and Bank Stock over what he would have received if such Annuities and Stock had

1848.

NEVILLE v. FORTESCUE.

been sold at the expiration of one year after the testator's death and the proceeds had been invested in the purchase of £3 per Cent. Consols; and that the trustees, by reason of their omitting to convert the Long Annuities and Bank Stock, became liable to make good, to the testator's residuary personal estate, the loss occasioned by such omission; and that the annuities and stock might be forthwith sold and the proceeds invested in the £3 per Cent. Consols; and that the Defendants, Mr. *Grenville's* executors, might make good such excess as aforesaid, and that the Defendants, the trustees, might make good the loss occasioned to the testator's residuary estate, by their before-mentioned omission.

Mr. *Grenville's* executors put in a general demurrer.

Mr. *Stuart* and Mr. *Charles Hall*, in support of the demurrer, said that it was the rule of the Court, in cases like the present, where the testator's personal estate was to be enjoyed by several persons in succession, to direct the whole of it to be converted into stock of a permanent nature; for, without such conversion, it could not be enjoyed in succession: that not only would the words of the will, in this case, be satisfied if such conversion were made, but they could not be satisfied unless it were made; for the testator had used the words "yearly dividends" and "yearly interest," neither of which were applicable to Long Annuities, and had declared that every person who should take an interest in his estates in the counties of *Somerset*, *Surrey* and *Bedford*, should take an interest, *to the same extent*, in his personal estate; which they could not do unless the whole of his personal estate was converted into stock of a permanent

1848.

NEVILLE v. FORTESCUE.

nature. *Howe* v. *Earl of Dartmouth* (*a*), *Chambers* v. *Chambers* (*b*), *Sutherland* v. *Cooke* (*c*).

Mr. *Bethell* and Mr. *Pole*, in support of the bill.

The VICE-CHANCELLOR:

The testator says: "And I hereby direct that the said persons," that is, the *cestuis que trust* under his will, "under letters of attorney and powers from the said trustees, who are hereby empowered to grant the same, shall receive the yearly dividends which may arise out of the public *or other funds*, and the yearly interest which may arise from *other parts* of my personal property." Therefore, he contemplates that various powers of attorney might be necessary to be executed by his trustees, in order to enable the persons who were to enjoy his personal estate in succession, to receive the annual proceeds of it. This seems to me to demonstrate that he intended the *cestuis que trust* to enjoy his personal estate in the state in which it might be at the time of his death. And, therefore, I shall allow the demurrer and declare that Mr. *Thomas Grenville* was entitled, during his life, to the dividends and annual income of the Long Annuities and Bank Stock in the bill mentioned.

(*a*) 7 Ves. 137. (*b*) *Ante*, Vol. XV. page 183.
(*c*) 1 Coll. Rep. 498.

TUCKER *v.* JOHNSON.

1848:
4th November.

Construction. Will.

Testator devised a manor and farm to *A.* and *B.* and their heirs to the use of his son for life, remainder in trust that the trustees, or the survivor of them, should pay and apply the rents and profits, or so much thereof as they or he should think proper, for the maintenance of his son's younger children during their minorities, and, after all those children should have attained twenty-one, to the use of them, their heirs and assigns.

Held that *A.* and *B.* did not take the legal estate in fee in the devised premises; but that the son took the legal estate for his life, with remainder to *A.* and *B.* for a chattel-interest, with remainder to the son's younger children in fee.

THE bill stated that *Robert Bartlett* the testator in the Cause, by his will dated the 10th of May 1815, devised to *John Edye* and *Thomas Newberry*, both since deceased, and their heirs, all that the messuage or dwelling-house wherein he then dwelt, with the closes, lands and hereditaments thereto belonging, called *Rousden*, and also his messuages, lands and hereditaments called *Bendon* and *Slaps*, and also his manor of *Brookland Trill*, together with his capital messuage and farm called *Brooklund*, to, upon and for the uses, trusts, intents and purposes, and with, under and subject to the powers, provisoes, conditions and limitations thereinafter expressed of and concerning the same; that is to say, as to, for and concerning his said messuage or dwelling-house wherein he then dwelt, with the closes, lands and hereditaments thereunto belonging called *Rousden*, and his said messuages, lands and hereditaments called *Bendon* and *Slaps*, to the use of his son, *R. C. Bartlett* and his assigns for and during the term of his natural life, and, from and immediately after the decease of his said son, then to the use of his grandson *R. C. Bartlett* the younger, and the heirs male of his body, in strict settlement, with remainder to the use of the daughters of the said *R. C. Bartlett*, the younger, as tenants in common in tail, with remainder to the use of the testator's own right heirs for ever: and, as to, for and concerning his said manor of *Brookland Trill* together with his said

1848.

TUCKER v. JOHNSON.

capital messuage or tenement and farm called *Brookland Farm*, to the use of his said son *R. C. Bartlett* and his assigns for and during the term of his natural life; and, from and after his decease, in trust that they, the said trustees and the survivor of them, should pay, apply and dispose of the rents, issues and growing proceeds of his last-mentioned estates, or so much thereof as they or he should think proper, for the maintenance, support and education of all and every the younger child and children of his said son *R. C. Bartlett*, other than and besides an eldest or only son, during their respective minorities, if more than one, and if but one such younger child, then to pay and apply the whole thereof for and towards the maintenance and education of such child other than and besides an eldest or only son; and, from and immediately after all and every the said child or children of his said son *R. C. Bartlett*, other than an eldest or only son, should have attained their respective ages of twenty-one years, then to the use of all and every such child or children other than and except an eldest or only son, his, her and their heirs and assigns for ever, as tenants in common and not as joint-tenants; and, if there should be but one child who should live to attain the age of twenty-one years except an eldest or only son, then to the use of such only child, his or her heirs or assigns for ever; and, if it should happen that all such children but one of his said son *R. C. Bartlett* should happen to die under the age of twenty-one years, then to the use of such only child upon his or her attaining the age of twenty-one years, his or her heirs or assigns for ever; and if all such children of his said son should happen to die under the age of twenty-one years and without having issue of his or her bodies lawfully begotten, then to the use of the testator's own right heirs for ever. Provided, always, and it was his further will,

desire and meaning that it should be lawful for his said trustees or trustee to pay or apply any part of the rents or profits of the said trust premises, for the putting or placing any or either of the sons of his said son *R. C. Bartlett*, other than an eldest son, in any business, profession or employment, or otherwise, for his or their preferment or advancement in the world.

The testator died shortly after the date of his will. Both *Newberry* and *Edye* survived him. *Edye* died in *Newberry's* lifetime. *Newberry* died in 1836; and his heir-at-law was made a defendant. On the Cause coming on to be heard, it was objected that his personal representative ought to have been made a party. In answer to that objection, it was said that *Newberry* and *Edye* took the legal estate in fee in the tenements devised to them.

The VICE-CHANCELLOR:

I deny that *Newberry* and *Edye* took the legal fee in the manor of *Brookland Trill* and *Brookland Farm*. The testator's son took the legal estate for his life, with remainder to *Newberry* and *Edye* for a chattel-interest (*a*); with remainder to the son's younger children in fee.

Mr. *Stuart*, Mr. *Bethell*, Mr. *James Parker*, Mr. *Rogers*, Mr. *Metcalfe* and Mr. *Glasse*, were the counsel in the Cause; which was ordered to stand over, with liberty to the Plaintiffs to amend by adding parties.

(*a*) See *Wyckham* v. *Wyckham*, 18 Ves. 395.

1848:
4th, 6th, and 11th November.

Debtor and Creditor. Voluntary Settlement.

A creditor who seeks to set aside a voluntary settlement made by his debtor, need not prove that the settlor was either insolvent or in embarrassed circumstances: it is enough for him to prove that the settlor was indebted at the date of the settlement.

SCARF *v.* SOULBY.

THE suit was instituted by a creditor, on behalf of himself and the other creditors of a testator, for the purpose of having a voluntary settlement of certain policies of insurance made, by the testator, nearly five years prior to his death, declared fraudulent and void under 13 Eliz. c. 5. The object of the settlement was to provide for a woman with whom the testator was cohabiting at the time, and for the children she had had during the cohabitation. It did not appear that there was any *mala fides* in the transaction, or that the testator was, though the bill so alleged, in insolvent or embarrassed circumstances when he made the settlement: but it was proved that he then owed the Plaintiff 200*l.*, and that that sum remained due at his death.

Mr. *Stuart*, Mr. *James Parker* and Mr. *Younge*, for the Plaintiff, cited *Richardson* v. *Smallwood* (*a*), *Lush* v. *Wilkinson* (*b*), *Holloway* v. *Millard* (*c*), *Townsend* v. *Westacott* (*d*), and *Whittington* v. *Jennings* (*e*).

Mr. *Bethell*, Mr. *Bacon* and Mr. *Southgate*, for the Defendants, the executors of the settlor and the parties interested under the settlement, cited *Gray* v. *Mathias* (*f*), and *Kidney* v. *Coussmaker* (*g*).

(*a*) Jac. 552.
(*b*) 5 Ves. 384.
(*c*) 1 Madd. 414.
(*d*) 2 Beav. 340, and 4 Beav. 58.
(*e*) *Ante*, Vol. VI. page 493.
(*f*) 5 Ves. 286.
(*g*) 12 Ves. 136; see page 155.

1848.

SCARF v. SOULBY.

The VICE-CHANCELLOR, having taken time to read over the pleadings, said:

It is stated, in the bill, that the settlor was embarrassed and insolvent when he made the settlement: but that is superfluous. It appears, from what Lord *Hardwicke* says in *Lord Townshend* v. *Windham* (*h*), that it is quite enough to prove that he was indebted at the time. Lord *Hardwicke* says: "I know no case on the 13th Eliz., where a man indebted at the time, makes a mere voluntary conveyance to a child, without consideration, and dies indebted, but that it shall be considered as part of his estate for the benefit of his creditors." Therefore, I shall declare that the settlement in this case is void as against the creditors of the settlor, and that the monies secured by the policies (which have been received by his executors) are assets for the payment of his debts.

(*h*) 2 Vez. 1; see page 11.

Willingale v. Maitland 3 L. Rep. Eq. 100

1848: 4th and 6th November.

Construction. Corporation. Trustees under an inclosure Act.

Trustees under an Act of Parliament for dividing and inclosing a common, held to be a corporation, by implication.

EX PARTE THE NEWPORT MARSH TRUSTEES.

BY a local Act of Parliament (4th Geo. III. c. 59) intituled "An Act for dividing and inclosing a Waste Ground called the Marsh in the Township of *Newport* in the County of *Salop*, and for applying the Produce thereof to the several Purposes therein mentioned," after reciting that there was, within the township, a common waste ground called the Marsh, containing one hundred and seventeen acres or thereabouts, wherein each householder in the town had, from time immemorial, had a right of turning a milch cow, which privilege had proved of very little advantage to the town; and that the Earl of *Shrewsbury* and Earl *Gower* were lords of the manor of *Newport*, and the former was entitled to four beast-gates in the Marsh: it was enacted that those two noblemen and their respective heirs, *Robert Pigott*, *Charles Baldwyn* and *James Coles*, Esqrs. and their respective heirs, the Rev. *Wm. Pigott*, rector of *Edgmond* and his successors rectors of *Edgmond* for the time being, the Rev. *T. Holbrooke*, the Rev. *J. Haynes*, the Rev. *R. Markham*, the Rev. *R. Ridershart*, minister of *Newport*, and his successors * the minister of *Newport* for the time being, the Rev. *S. Lea*, schoolmaster of *Newport*, and his successors* the head-schoolmaster of *Newport* for the time being, the Rev. *J. Justice* of *Ightid*, *William Brooke* of *Chetwynd End*, *Edward Pearson* of *Tetnall* and certain other individuals who were therein named and mentioned to be resident burgesses of *Newport*, and their respective heirs, and all burgesses of *Newport* thereafter to be created, and their heirs respectively, during the time of

* Sic.

1848.

EX PARTE THE NEWPORT MARSH TRUSTEES.

their respective residence within the said borough; *John Leake*, *Thomas Marshall*, *Thomas Dean*, &c., &c., &c. inhabitants of *Newport*, should be, and they were thereby trustees for inclosing, improving and dividing the Marsh and putting the Act in execution: and that, upon the death of any trustee thereby appointed or thereafter to be appointed whose heir should not succeed to the trust, it should be lawful for the surviving or remaining trustees, or any nine or more of them, from time to time, to elect one other person to be a trustee in the room of every trustee so deceased; but that notice in writing of the time and place of meeting for every such election, should be fixed upon the most public place of the market-hall in *Newport*, ten days at least before every such meeting; and all persons who should be so elected, were thereby vested with the same power for putting the Act in execution as the parties in whose place they should be chosen, were vested with: That no person should be capable of acting as a trustee in the execution of the Act, unless he should be, in his own right or in right of his wife, in the actual possession and enjoyment of the rents and profits of lands, tenements and hereditaments of the clear yearly value of 20*l.*, or possessed or entitled to a personal estate to the value of 500*l.*: That the trustees or any five or more of them, should meet together, at the Swan Inn in *Newport*, on the tenth of May 1764, and should then and from time to time adjourn themselves and meet at the same or such houses and places in *Newport* as they or any five or more of them should, from time to time, think most convenient; and that all acts, orders and determinations of the trustees in execution of the Act should be made at meetings to be held by virtue of the Act, and not otherwise, and that no such act, order or determination should be made unless a majority of the trustees present should concur therein; nor should any such act,

1848.

EX PARTE THE NEWPORT MARSH TRUSTEES.

order or determination be revoked or altered, or the Marsh leased or mortgaged unless nine trustees should be present. The Act further enacted that all right of common or pasturage in or upon the Marsh should cease and be extinguished, from and immediately after the passing of the Act: and it authorized and required the trustees or any five or more of them, to cause the Marsh to be surveyed as soon as conveniently might be after their first meeting, and to allot a portion of it to Lord *Shrewsbury*, as a satisfaction of his beast-gates; and it directed that the residue of the Marsh should be, and the same was thereby vested in the trustees *and their successors for ever*, freed and discharged of and from all right, title and interest whatsoever which the householders of the town or any other person or persons could or might have in or to the same or any part thereof, except as thereinafter excepted, in trust nevertheless for the purposes thereinafter mentioned. The Act then directed that the trustees, or any nine or more of them, should cause the residue of the Marsh to be inclosed and improved in such manner and by such ways and means as they should think most expedient and beneficial for the purposes of the Act; and that it should be lawful for the trustees, or any nine or more of them, to mortgage or let the same or any part or parts thereof, from time to time, to any person or persons who should be willing to advance money thereupon or to take the same, for such term or terms, and under such rents and reservations, by and with such covenants, provisoes and agreements as they or any nine or more of them should think proper and convenient; and, out of the monies to be borrowed upon mortgage or to arise from the rents and profits of the Marsh, in the first place, to pay the expenses of obtaining the Act and of inclosing, draining, improving and preserving the residue of the Marsh, and, afterwards, to

1848.

Ex parte The Newport Marsh Trustees.

pay all chief rents due to the lords of the manor as the same should become due; and to apply the residue of the monies arising from the Marsh, in paving and keeping in repair the streets of *Newport;* in repairing and keeping in repair the market-hall and public cross there; and in carrying on, encouraging and extending a woollen or some other manufacture within the township, by such ways and means, and under such rules, orders and regulations, as they or any nine or more of them should, from time to time, direct, order or issue for those purposes respectively; in apprenticing poor children who were parishioners of *Newport;* or to or for such other purposes as the trustees, or any nine or more of them, should think proper. The Act next empowered the trustees, or any five or more of them, from time to time, to cause a certain watercourse from the Marsh, to be deepened and widened in such manner as they should think proper; and enacted that, in case the owners and occupiers of lands adjoining the Marsh, should, at any time thereafter, neglect to keep their fences in repair and their ditches sufficiently widened and cleansed, it should be lawful for the trustees, or any five or more of them, to cause the same to be done, and to levy the charges thereof by distress and sale of such goods and chattels as should then, or at any time thereafter, be found on the lands or grounds to which the fences or ditches should belong.

Upon the hearing of a petition presented by nine of the trustees of the Marsh, for payment of a sum of money which had been paid into Court by a railway company, who had taken part of the Marsh for the purposes of their undertaking, the question was whether the trustees were not, in effect, constituted a body corporate by their Act of Parliament.

1848.

EX PARTE THE NEWPORT MARSH TRUSTEES.

Mr. *Malins* and Mr. *Little* appeared upon the petition; and the latter gentleman, who raised the question, referred to *The Conservators of the River Tone* v. *Ash* (*a*).

The VICE-CHANCELLOR:

I have read over the Act of Parliament; and, as I understand, the only question that I have to decide, is whether that body which was created by the Act of Parliament, is a corporation.

I cannot but think, from the nature of the provisions of the Act, that it was intended that the body should continue for ever, and that they should hold, for ever, the Marsh in question.

The frame of the Act is this. First of all, the Earl of *Shrewsbury* and his heirs, and Lord *Gower* and his heirs, and then some gentlemen who are named and their heirs, and then a variety of other persons who are named, and then the schoolmaster for the time being, and the resident burgesses for the time being, and then all the persons that should at any time thereafter be burgesses, and their heirs, during the time of their residence in the borough, were to be trustees for inclosing, improving, and dividing the Marsh and for putting the Act into execution. Now, putting the Act into effect was a thing which, of necessity, would continue without limit. There was no period of time when the Act might not be capable of being put into operation; and, though there are particular modes pointed out in the statute, by means of which some of the body might act, yet it is stated

(*a*) 10 Barn. & Cress. 349.

what they were to do; they were to make leases and mortgages; and, consequently, therefore, whatever might be the intention of the Legislature, yet, if I find the fact to be that the necessary construction of the Act of Parliament is that the persons named were to hold certain lands for ever, and to deal with them for ever, it appears to me that they necessarily became a corporation, although they are not expressly made so by the Act.

It is said, in Co. Litt. page 250, *a*, respecting a corporation: "This is a body to take in succession, framed (as to that capacity) by policy; and, thereupon, it is called here, by Littleton, a body politic; and it is also called a corporation or a body corporate; because the persons are made into a body, and are of capacity to take and grant," &c. In this case, a limited mode of carrying out the Act is expressly pointed out by it, that is, by leasing and mortgaging; and it appears to me, therefore, that although there are no words found in it, as to the trustees taking in succession, yet, by the very constitution of the body itself, and by the powers given to it by the Act, it must be taken to be a corporation.

The question however, is a legal one, and, therefore, the parties, if they are not satisfied with my opinion, must take the opinion of a Court of Law upon it.

1848:
6th, 7th, and
11th November.

Will.
Republication.
Codicil.
Construction.

JOWETT *v.* BOARD.

THIS was a suit for the administration of the estate of *Harriot* Countess of *Winterton*, the testatrix in the Cause. On the hearing of a petition praying for leave to except to the *Master's* report made in obedience to the decree in the Cause, the question was whether a codicil made by the Countess, in October 1829, operated as a republication of her will, and made it pass freehold property purchased by her after the date of her will.

A married lady having, under her settlement, freehold property settled to her separate use, and power to dispose of it by will, exercised that power by devising a certain part of the property to *A.* for life, with remainder to her nephew, and gave all the other freehold tenements, which she had, in anywise, power to dispose of, to her nephew for life, with remainder to his children. She, afterwards, purchased some leasehold tenements, out of her separate property, and had them assigned to *M.*, in trust as she should by deed, will or codicil, appoint: and, in exercise of that power, she, by a codicil, bequeathed the leaseholds to her nephew, and confirmed her will. Some time afterwards she purchased the reversion in fee of the leaseholds, and had it conveyed to *N.* in trust as she should, by deed or will, appoint. She then made another codicil, in exercise, expressly, of the power reserved to her by the settlement *and of all other powers*, and thereby, after reciting the specific devise made by her will, she gave the property which was the subject of that devise, to *A.* in fee.

Held that the second codicil did not republish the will, and, therefore, that the reversion in fee in the leaseholds, did not pass by the residuary devise in the will, but the testatrix died intestate as to it.

The petition, which was presented by the Defendants *Richard Board* and *John Eldridge*, the surviving executors of the testatrix's will and codicils, stated that the testatrix, *Harriot*, the wife of *Edward* Earl of *Winter-*

Practice.—Petition.—Report.

After a *Master's* report had been absolutely confirmed, a petition was presented for leave to except to it. The petition was heard with the Cause for further directions, and the Court, without directing a reference back to the *Master*, made an order in accordance with the prayer of the petition.

1848.

JOWETT v. BOARD.

ton, was, under and by virtue of powers reserved to her by her marriage-settlement, enabled to dispose of her separate estate; and that she was also entitled to dispose of property purchased by her with the accumulations of her separate estate: that, in exercise of those powers, she made her will, dated the 21st of March 1823, whereby, amongst other things, she gave, devised, directed, limited and appointed her glebe land in the parish of *Westerham* in *Kent*, and also her parsonage field in *Westerham*, together with certain other premises therein mentioned, unto and to the use of the Reverend *John Hanley*, since deceased, and the petitioner, *John Eldridge*, their heirs and assigns, in trust for the other petitioner *Richard Board* and his assigns for his life, and, after his death, upon trust to sell the said premises, and to stand possessed of the net proceeds of the sale, upon the trusts declared, by the testatrix, of the residue of her personal estate; and that she gave, devised, directed and appointed all the messuages, lands, tenements, hereditaments and real estate whatsoever and wheresoever, not thereinbefore specifically devised or appointed, which she had, in anywise, power to give, devise, direct or appoint or otherwise dispose of, at Law or in Equity, by her will, for any estate of freehold and inheritance or of freehold only, in possession, reversion, remainder or expectancy, unto and to the use of the petitioners and *Hanley*, their heirs and assigns, in trust for her nephew, *William Board Edward Gibbs Crawfurd*, and his assigns during his life, and, after his decease, in trust for his children who should attain twenty-one, their heirs and assigns for ever, equally, as tenants in common: And that the testatrix also gave, bequeathed, directed and appointed, unto the petitioners and *Hanley*, their executors, administrators and assigns, all monies and securities for money and other per-

1848.

JOWETT v. BOARD.

sonal estate and effects whatsoever and wheresoever, which she had, in anywise, power, by her will, to give, bequeath, direct or appoint, not thereinbefore specifically bequeathed or appointed, upon trust to convert the same and invest the proceeds in government securities, and to pay the interest and dividends to her nephew and his assigns during his life, and, after his death, to stand possessed of the same in trust for his children who should attain twenty-one, in equal shares as tenants in common. The petition next stated that, in 1826, the testatrix purchased, from *J. L. Minet*, Esq., out of her own separate monies, certain freehold and leasehold hereditaments in *Kent*, and, by indentures of lease and release and assignment dated the 24th and 25th of September 1826, the leasehold hereditaments were assigned to the petitioner *Board* (a trustee named for the testatrix), his executors, &c., for the residue of the term therein, and the freehold hereditaments were conveyed unto and to the use of *Board*, his heirs and assigns; and it was thereby declared that *Board*, his heirs, executors, administrators and assigns should stand seised and possessed of the said freehold and leasehold premises, in trust, during the life of the testatrix, to pay the rents to her or her appointment, for her separate use, and to convey and assign the same, either in her lifetime or after her decease, unto such persons as she, by deed, will or codicil should direct, limit, give or appoint the same, and, in default thereof, upon trust, after her decease, to convey and assign the same unto such person as should be her heir-at-law at her decease; it being intended that the said leasehold premises should be held together with the said freehold hereditaments. The petition further stated that the testatrix made a codicil to her will, dated the 21st of April 1828, which, so far as it was material, was as follows: "And whereas I have lately, and long

1848.

JOWETT v. BOARD.

since the making and publishing of my said will, out of the principal of the said stocks so invested in the public funds, purchased, from *J. L. Minet*, Esq., all that capital messuage or tenement situate in the town of *Westerham*, together with the garden, yard, coach-house, stables and other buildings thereunto belonging, late in the occupation of Mrs. *Larkins*; and also all that messuage and butcher's shop and other buildings situate also in the said town, late in the occupation of *F. Payne*, and also all that messuage or cottage, croft of land and other premises, situate also in the said town, late in the occupation of *J. Alchorne*, part of which said hereditaments and premises is freehold and part leasehold for the remainder of a term of ninety-nine years, and which said freehold and leasehold messuages, shop, garden, croft of land, hereditaments and premises were conveyed by indentures of lease and release and assignment bearing date respectively, the lease, the 24th and the release and assignment, the 25th of September now last, by the said *J. L. Minet* and others to the said *Richard Board* and to his heirs, executors, administrators and assigns as a trustee for me, upon trust that the said *Richard Board*, his heirs, executors, administrators and assigns respectively, shall and do convey, assign and dispose of the said freehold and leasehold capital and other messuages, shop, garden, buildings, hereditaments and premises, either in my lifetime or after my decease, unto such person or persons and for such estate and estates, use and uses, intents and purposes, as I shall, by any deed or deeds writing or writings under my hand and seal, or by my last will and testament or any codicil or codicils, direct, give, limit or appoint: Now I do, by this codicil to my last will and testament, in exercise of the said power so vested in me in and by the said release and assignment, or of any other power or authority enabling me so to do,

1848.

JOWETT v. BOARD.

devise, bequeath, direct, limit, give and appoint all and singular the said capital messuage, coach-house, stables, garden, yard and other buildings thereunto belonging, and the said other messuage or tenement, butcher's shop, croft of land, gardens, yards, buildings, hereditaments and appurtenances to the same belonging, and all and singular other the premises so purchased by me of the said *J. L. Minet* and conveyed and assigned to the said *Richard Board* in trust as aforesaid, unto the said *Richard Board*, *John Hanley*, and *John Eldridge* and their heirs, executors and administrators, upon trust, as soon as conveniently may be after my decease, to sell the same, and to lay out and invest, in their names, the monies arising from such sale, in the parliamentary stocks or public funds, and pay the interest and dividends of the same unto my said nephew and his assigns during his life, and, after his decease, to stand possessed of the principal, in trust for all and every the children and child of my said nephew, who, being a son or sons, shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain that age or marry, to be divided between or among them, if more than one, in equal shares, and if but one such child, the whole to be in trust for such only child;" the testatrix then directed the trustees to accumulate the income of the trust funds after the death of her nephew and until the shares of his children should vest in them, and that the accumulations should be held upon the same trusts as the capital was subject to; and that, if her nephew should have no child who should become entitled to a vested interest in the trust funds, the same and the accumulations thereof, should be held upon the same trusts as were declared, in her will, of the residue of her funded property standing in the names of her nephew and two other persons, and of the money in the hands

1848.

JOWETT v. BOARD.

of her bankers; and she ratified and confirmed her will in every other respect whatsoever. The petition then stated that, in November 1828, the testatrix purchased, out of her separate monies, the reversion in fee of the said leasehold hereditaments; and, by indentures of lease and release dated the 5th and 6th of that month, the reversion was conveyed unto and to the use of *John Jones* (a trustee named for the testatrix) and his heirs and assigns, upon trust to pay the testatrix the rents during her life, for her separate use, and to convey the hereditaments, in her lifetime or after her death, unto such persons as she should, by deed or will, direct or appoint, and, in default thereof, upon trust, after her decease, to convey the same hereditaments unto her heir-at-law, his heirs and assigns. The petition further stated that the testatrix made another codicil to her will, dated the 7th of October 1829, and which was as follows: "This, is a codicil to the last will and testament of me, *Harriot* the wife of *Edward* Earl of *Winterton*, *made under and by virtue of and in exercise of the power or powers for that purpose reserved to me in and by a certain indenture of settlement executed previously to and in contemplation of my marriage with the said Earl, and of every or any other power in anywise enabling me in this behalf:* Whereas I have, in and by my said will, given, devised, directed, limited and appointed, *inter alia*, all my glebe-land in the parish of *Westerham* in the county of *Kent*, and all that the Parsonage-field in *Westerham* aforesaid, unto and to the use of certain trustees therein named, their heirs and assigns for ever, upon and for the trusts, intents and purposes and with, under and subject to the powers, provisoes and declarations therein expressed and declared of and concerning the same, that is to say, in trust for the said *Richard Board* and his assigns during his life, and, after the decease of the said *Richard*

1848.

JOWETT v. BOARD.

Board, upon trust as therein mentioned; as, on reference to my said will, will more fully appear: Now I do, hereby, by virtue of the power and authority hereinbefore alluded to *and of all other powers and authorities*, give, devise, limit and appoint all my said glebe-land in the parish of *Westerham* and all that the said Parsonage-field in *Westerham* aforesaid, and all my estate, right, title and interest in and to the same, unto and to the use of the said *Richard Board*, his heirs and assigns for ever." The petition then stated that the testatrix survived her husband and died on the 21st of April 1831, leaving her nephew her sole heir at common law and in gavelkind: That the properties comprised in the indentures of the 24th and 25th of September 1826, and in the indentures of the 5th and 6th of November 1828, were greatly intermixed with each other, and that, all parties interested therein being desirous that the same should be sold, the petitioners, in 1836, sold the same for 2500*l.*: That, at the time of the sale, the petitioners were advised that the equitable estate in fee in the reversion conveyed by the indentures of the 5th and 6th of November 1828, had descended to the testatrix's nephew; and that he was also absolutely entitled to the equitable interest in the term, by reason of the same having been merged* by the subsequent purchase of the reversion; and that the appointment of the leasehold estates contained in the codicil of the 21st of April 1828, had been thereby defeated: That it was agreed that, out of the sum of 2500*l.*, the sum of 2000*l.* should be taken as the proportionate value of the fee simple and inheritance in possession of such parts of the hereditaments as were not comprised in the term of ninety-nine years, and the sum of 500*l.* as the proportionate value of the fee simple and inheritance in possession of such part of the same here-

* Sic.

1848.

JOWETT v. BOARD.

ditaments as were comprised in the same term of years: That the said sum of 500*l.* was further apportioned in manner following, that is to say, 200*l.*, part thereof, was fixed as the proportionate value of the said leasehold interest for the residue of the term of ninety-nine years, and the sum of 300*l.*, residue thereof, as the proportionate value of the reversion in fee simple therein expectant on the determination of the term: That the testatrix's nephew joined in the conveyance of the said property to the purchaser of it, and thereupon the 500*l.* was paid to him: That the *Master*, in pursuance of the decree in the Cause, made his general report dated the 13th of January 1848, and thereby found that the hereditaments and premises mentioned in the indentures of the 25th of September 1826 and the 6th of November 1828, consisted of a messuage or tenement with the garden, yard, coach-house, stable and other buildings thereto belonging, situate in *Westerham*, in the occupation of Mrs. *Larkins*, and also a messuage and butcher's shop and other buildings, situate in *Westerham*, near to or adjoining the last-mentioned messuage, late in the occupation of *F. Payne*, and also a messuage and cottage and close of land and other premises situate in *Westerham* and near to and adjoining the said premises in the occupation of Mrs. *Larkins* and occupied by *John Alchorne*, which last-mentioned hereditaments and premises were purchased, by the testatrix, and conveyed in trust for her since the date and execution of her will, and part thereof for an estate of inheritance in fee simple, and part thereof for the unexpired residue of a term of ninety-nine years, and were devised and appointed, or intended so to be, by the first codicil to her will, to the petitioners and *J. Hanley*, and their heirs, executors and administrators, upon trust to sell the same and invest the proceeds as therein mentioned, and stand possessed of the securities

1848.

JOWETT v. BOARD.

for the same, upon trust to pay the interest to the testatrix's nephew during his life, and, after his death, upon certain trusts for his children; and that, after the date of the said first codicil, she purchased the reversion in the leasehold part of the said premises; and that, soon after her death, the petitioners entered into the possession of the last-mentioned premises and paid the rents to the testatrix's nephew, and continued so to do until the year 1836, when they sold the same hereditaments, in pursuance of the trusts of the said will, for 2500*l.*, with which sum the *Master* had charged the petitioners; and the *Master* found that the petitioners had applied part of the 2500*l.* in the manner set forth in his report, amounting to 2040*l.* 9*s.*, which being deducted from the 2500*l.*, there remained 459*l.* 11*s.* due, from the petitioners, in respect of the 2500*l.*: That *the report had been absolutely confirmed:* That the petitioners were advised that the testatrix's nephew was, as the heir-at-law and as the gavelkind heir of the testatrix and under the circumstances before stated, entitled to receive the 500*l.*: That the *Master*, in and by his report, had considered and treated the 500*l.* as having been improperly paid, by the petitioners, to the testatrix's nephew, and had accordingly refused to allow the petitioners the 500*l.*, in their discharge: That the Cause had been set down to be heard for further directions: That a petition had been presented on behalf of the Defendants, the children of the testatrix's nephew, seeking to make the petitioners responsible for the 500*l.* paid to their father, together with compound interest thereon from the death of their father (which happened in 1840) to the period of their attaining their respective ages of twenty-one.

The petition prayed that the petitioners might be at liberty to except to those parts of the report whereby

1848.

JOWETT v. BOARD.

the *Master* had found that the premises thereinbefore mentioned, were devised and appointed, or intended so to be, by the first codicil; and whereby he had found that 459*l.* 11*s.* remained due, from the petitioners, in respect of the 2500*l.*: and that, if necessary or proper, the petition might be deemed to be and be treated as being in the nature of exceptions to the report in the matters above complained of, and might come on (as it did) to be heard with the Cause on further directions.

Mr. *Rolt* and Mr. *Elmsley*, in support of the petition, contended that the term of ninety-nine years, was merged, in equity, by the conveyance of November 1828: that the codicil of the 7th of October 1829, though it purported to be an exercise of the power reserved to the testatrix by her marriage settlement *and of all other powers*, was, as the recital and operative part of it plainly shewed, an exercise of the power reserved to her by her marriage settlement, and not an exercise of the power reserved to her by the indenture of the 6th of November 1828: secondly, that, though a codicil, general in its terms, might republish a will and make it speak and take effect from the date of the codicil, yet a codicil which, like the one in question, was limited to a particular part of the estates devised by the will, could not have that effect: *Strathmore* v. *Bowes*(*a*).

Mr. *Rogers*, for the children of the testatrix's nephew, contended that the term was not merged, but became attendant upon the inheritance of the premises conveyed by the indentures of November 1828; and that the codicil of October 1829 republished the will, and made the

(*a*) 7 T. R. 482.

1848.

JOWETT v. BOARD.

residuary devise in it, include the premises the reversion of which was conveyed by those indentures.

The VICE-CHANCELLOR:

This is rather a singular case. It stands in this way. The testatrix in question was a married woman. By virtue of her marriage settlement, she had the power of disposing of certain property; and I shall, for the sake of distinction, call that power, the settlement power, and that property, the settlement property. Having that power, she made her will on the 21st of March 1823, according to the power, and, thereby, made a specific appointment in the nature of a specific devise, and a disposition of the residue in full execution of the power. After that, she purchased a leasehold tenement; and that leasehold tenement was assigned to *Board* in trust for her, virtually, for her separate use, giving her a power of appointment. She then, in execution of what I will call the leasehold power, made a codicil of the 21st of April 1828, by which she disposed, in the nature of a specific bequest, of that leasehold. She then purchased the reversion in fee of the leasehold: and that reversion was conveyed, not to *Board*, but to *Jones*, a different trustee, in fee, in trust for her separate use, giving her a power of appointment. She then made a second codicil of the 7th of October 1829; and that codicil, in terms, refers only to that portion of the specific property which was the subject of the settlement; and it was executed in pursuance of the settlement power; although, I admit, it purports to be made in pursuance of that power and of all other powers vested in the testatrix. And, in pursuance of the settlement power and of all other powers in her vested (although it does not appear that she had any other power which would affect the property specifically appointed and de-

vised by the will, except the original power) she revokes the testamentary appointment in the nature of a specific bequest which she had made by her will, and makes a different disposition of the property. That is the whole of that codicil. There is not one word in it, which tends to shew that she intended that there should be any other alteration whatever in the effect of her testamentary appointment, save and except that which was confined to the specific object of revoking the first specific bequest.

It appears that the *Master*, in pursuance of a reference made to him, to inquire and state what had become of certain money which arose from the sale of divers tenements, has treated a surplus sum, or some fractional part of 500*l.*, as if it did, under the circumstances that I have stated, necessarily belong to the residuary appointees in the first testamentary instrument, and has proceeded on the supposition that, inasmuch as the lady did make this codicil of October 1829, it had the effect of making the will speak from its date as to the residuary devise which is found in it. Suppose it did have that effect, yet, in the first place, the residuary devise in the will, was nothing more than an appointment of the residue of the settlement property after dealing with the specific part which was first appointed. But the truth is that, in order to make the will speak from its date so as to vest the property in the residuary appointees under the will, you must find a clear intention to execute the power which affected the reversion of the leasehold tenement. But there is not a single allusion either to the power which was reserved for the purpose of enabling the lady to appoint the leasehold in question, or of enabling her to appoint the reversion in question. And, that being the only point which has been made, as a matter of law, against the claim of Mr. *Rolt's* clients, who have

1848.

JOWETT v. BOARD.

presented a petition for the purpose of correcting what they allege to be an error in the report, my opinion is that the report is erroneous in the parts objected to, and that the error must be set right on this petition.

I have read through the whole of the *Master's* report, and it appears from it, that the *Master* has taken notice, certainly, of the will and the different codicils; but it does unfortunately happen that this particular view of the subject presented by Mr. *Rolt* and which I think is the correct view, never was presented to the *Master's* mind. Consequently, there is an error in the ultimate finding; which error, however, is capable of being corrected by duly adverting to the instrument which is embraced in the body of the report. Therefore, I think, that this was a proper case to be brought before the Court by way of petition for leave to except: for it is quite immaterial in what form the Court hears the discussion.

If the report had been brought forward without any attempt of that kind, still it would have been competent for the party to have made the argument. But I think there is a great deal of reasonableness in allowing a petition to be presented which, stating the facts of the case in detail and with as much clearness as this petition does, shews, at once, to the Court, what is the true view to take of the case. I think also that it is not necessary to send it back to the *Master*; and, therefore, I shall at once direct, on the hearing of this petition, that the 459*l.* 11*s.* claimed by Mr. *Rolt's* clients shall be retained by them; and that the costs of this petition shall be paid by Mr. *Rogers's* clients.

Money v Jordan 13 Beav. 230.

MACGREGOR *v.* CUNNINGHAM.

1848:
9th November.

Defendant.
Injunction.
Practice.

THE bill was filed for a discovery in aid of the Plaintiff's defence to an action which the Defendants, who were eight in number, had brought against him. The Plaintiff obtained the injunction for want of answer. Six of the Defendants then put in their answer and obtained an order to dissolve the injunction as against themselves. Afterwards the two other Defendants put in their answer, but would not move to dissolve the injunction as against themselves, although it was competent, to them, to do so. Whereupon the other six moved, without notice to their co-Defendants, that the injunction might be dissolved as against the latter.

Injunction granted to restrain a joint action brought by *A. B. C. D.* and *E. A. B.* and *C.* put in a joint answer, and afterwards dissolved the injunction as against themselves. *D.* and *E.* then put in their answer, but would not move to dissolve the injunction as against themselves, although it was competent to them so to do. The Court on a motion made by *A. B.* and *C.*, without notice to *D.* and *E.* dissolved the injunction against *D.* and *E.*

Mr. *Bethell* and Mr. *Lloyd*, in support of the motion, cited *Nanney* v. *Vaughan* (*a*), *Glascott* v. *The Copper-miners' Company* (*b*), and *Joseph* v. *Doubleday* (*c*).

Mr. *Stuart* and Mr. *John Baily* opposed the motion.

The VICE-CHANCELLOR:

It seems to me, from what was said by Lord *Eldon* in *Joseph* v. *Doubleday*, to be a matter of course to grant this motion.

In that case a joint action was brought by solvent

(*a*) *Ante*, Vol. VIII. page 305.
(*b*) *Ante*, Vol. XI. page 439.
(*c*) 1 Ves. & Beam. 497.

1848.
MACGREGOR v. CUNNINGHAM.

partners and the assignees of a bankrupt partner; and the Defendant in the action filed a bill for a discovery, and an injunction to restrain the action. The injunction having been obtained, the solvent partners put in a joint answer and obtained a dissolution of the injunction as against themselves. After that, the assignees put in their answer, and then the solvent partners moved to dissolve the injunction as against the assignees: and Lord *Eldon* declared it to be his opinion that it was competent to the solvent partners to make the motion; but that it could not be granted, because exceptions were pending to the answer of the assignees. That was an admission that, if the answer of the assignees had been a full answer, the motion would have been granted.

Motion granted.*

* See the judgment in *Lewis* v. *Smith*, 7 Beav. 470.

1848: 16th November.

Interest. Tenant for Life.

WILLCOCKS *v.* BUTCHER.

Interest at four *per cent.*, allowed to the tenant for life of a trust fund upon the amount found due to her for arrears of interest of the fund.

UPON the minutes of the order on further directions in this Cause, being spoken to,

The *Vice-Chancellor* gave interest, at four *per cent.*, from the death of the testator in the Cause, upon the sum of 1162*l.* which had been found due, from the testator, to a lady, for the arrears of the interest of a trust-fund of which she was tenant for life.

Mr. *Bethell* and Mr. *Hallett*, in support of the claim, referred to 3 & 4 Will. IV. c. 42, s. 28: *Hyde* v.

Hogg v. Johnson 2 L. Rep. Ch. 229

Price (*a*), *Morse* v. *Tucker* (*b*), and the 46th Order of August 1841 (*c*).

1848.
WILLCOCKS v. BUTCHER.

Mr. *Koe* opposed the claim.

(*a*) *Ante*, Vol. VIII. page 578.
(*b*) 5 Hare, 79.
(*c*) Beav. Ord. 177.

ROBERTS *v.* ROBERTS.

1848: 10th November.

Pleading. Parties. Supplemental Bill.

Testator gave his personal estate and the produce of the sale of his real estates, to trustees in trust for such of his children as should attain twenty-one; and if all of them should die under that age, in trust for the persons who, under the Statutes of Distribution, would then be entitled thereto. The children, all of whom were infants, filed a bill against the trustees, to have the trusts of the will carried into execution: and, after a decree had been made they filed a *supplemental* bill, against the testator's widow and next-of-kin, praying that they might have the benefit of the decree and other proceedings in the original suit, against the widow and next-of-kin.

Held that the bill ought to have been an original one.

THE Plaintiffs were the children of *E. R. Roberts*, the testator in the Cause, and were infants. The bill alleged that, on the 17th of September 1847, the Plaintiffs exhibited their original bill against the trustees and executors of their father's will, stating that their father had devised his real estates to the trustees and executors, in trust to sell, and directed them to stand possessed of the proceeds and of his residuary personal estate, in trust for such of the Plaintiffs as should attain twenty-one or marry under that age, and, if all of them should die under that age and without having been married, in trust for the person or persons who, under the statutes made for the distribution of the estates of intestates, would then be entitled thereto: and praying that the testator's personal estate might be administered and the trusts of his will carried into execution under the direction of the

1848.

ROBERTS v. ROBERTS.

Court. The bill further stated that the original suit had been heard, and set forth the decree in it: after which, it alleged, *by way of supplement*, That, since the decree had been made, *Elizabeth Roberts*, the testator's widow, had set up a claim to a portion of the testator's personal estate or the trust monies, funds and securities holden upon the trusts of his will, under the contingent trust therein contained for the benefit of the person or persons who, under the statutes for the distribution of the estates of intestates, would, in the event therein mentioned, be entitled to the said trust monies, funds and securities: and that *Robert Dampier* and *S. Frances*, his wife (she being the only sister and next-of-kin of the testator) and her four children, *Frederick Elliot*, *Matilda Elizabeth*, *Augustus*, and *Juliana* claimed to be contingently interested in the said personal estate, trust monies, funds and securities under the same contingent trust: and that the Plaintiffs were advised that, in case Mrs. *Roberts* and Mr. and Mrs. *Dampier* and their children, had any interest in the personal estate, trust monies, funds and securities, the Plaintiffs were entitled to have the benefit of the decree and other proceedings in the original suit as against them, and to have the same relief, against them, as the original bill sought against the Defendants thereto; and that the Plaintiffs were also advised that the trustees and executors of the testator's will were necessary parties to the present suit. The bill prayed that it might be taken *as supplemental* to the original bill; and that the Plaintiffs might have the full benefit of the decree and proceedings in the original suit, as against Mrs. *Roberts*, Mr. and Mrs. *Dampier* and their children, and the same relief against them, so far as the Plaintiffs might be entitled thereto, as the original bill prayed against the Defendants thereto; and that the Plaintiffs might have such further relief as the nature of the case might require, and to the Court

should seem meet; and that a subpœna might be granted to them, requiring Mrs. *Roberts* Mr. and Mrs. *Dampier* and their children, and the trustees and executors, to appear and answer, "all and singular *the premises*."

Mrs. *Roberts's* answer, stated that, before the original bill was filed, the Plaintiffs, by her as their next friend, filed a bill, against the executors and trustees, to have the trusts of the will carried into execution, and the testator's personal estate administered; and that that bill was afterwards amended by making Mrs. *Roberts* a co-Plaintiff and Mr. and Mrs. *Dampier* and their children, Defendants.* The answer added that Mrs. *Roberts* was not, nor were Mr. and Mrs. *Dampier* or their children parties to the original bill in this suit; and it submitted that the Plaintiffs were not entitled, either as against Mrs. *Roberts*, or as against Mr. and Mrs. *Dampier* and their children, to have the benefit of the decree and other proceedings in the original suit, or to have the same relief as was prayed by the bill in that suit.

On the supplemental Cause coming on to be heard,

Mr. *Rolt* and Mr. *Lovat*, in support of the objection, said that the bill by which Mrs. *Roberts* was brought before the Court, did not contain any statement that there was a will; that she was not a party to the original suit, nor did she claim, by representation or otherwise, under any person who was a party to that suit; and, therefore, the bill by which she was brought before the Court, ought to have been an original and not a supplemental one.

* See *Roberts* v. *Roberts*, 2 Phill. 534.

1848.

ROBERTS v. ROBERTS.

Mr. *Stuart* and Mr. *Torriano* for Mr. and Mrs. *Dampier* and their children, cited *Jenkins* v. *Cross* (*a*), and submitted to any decree that the Court might think proper to make.

Mr. *James Parker* and Mr. *Sidebottom* for the Plaintiffs, cited *Asbee* v. *Shipley* (*b*) and the following passage in Lord *Redesdale's* Treatise on Pleading: "Where the imperfection of a suit arises from a defect in the original bill or in some of the proceedings upon it, and not from any event subsequent to the institution of the suit, it may be added to by a supplemental bill merely. Thus a supplemental bill may be filed to obtain a further discovery from a Defendant; to put new matter in issue, or to add parties where the proceedings are in such a state that the original bill cannot be amended for the purpose" (*c*): and they submitted that, if the Plaintiffs were not entitled to a decree as in a supplemental suit, they were entitled to a decree as in an original suit.

The VICE-CHANCELLOR:

There is no evidence, before me, in this suit, that there is any will; and, therefore, if it were an original suit, I could not make any decree in it, so as to bind Mrs. *Roberts* or any of the other parties who are now brought before the Court for the first time. Neither can I make a decree as in a supplemental suit: for Mrs. *Roberts* and the *Dampiers* do not represent or claim under any party to the original suit.

If there be a will and it contain such a gift by way of sub-

(*a*) *Ante*, Vol. XV. page 76. (*b*) Madd. & Geld. 296.
(*c*) Page 48, edit. 5.

stitution as is represented, persons who claim under that gift, ought to have been made parties to the original bill.

1848.

ROBERTS v. ROBERTS.

His Honour afterwards considered that there was sufficient allegation, in the bill, that there was a will, so far as the personal estate was concerned, to authorize him to make a decree with respect to that part of the testator's property; and, on the Plaintiff's solicitor producing the probate-copy of the will, he directed the usual accounts to be taken of the testator's personal estate, debts, funeral and testamentary expenses and legacies; and his personal estate to be applied in payment of his debts and funeral and testamentary expenses, in a due course of administration, and then, in payment of his legacies.

BLAGROVE *v.* HANCOCK.

1848: 13th, 17th, and 22nd November.

Remoteness. Will. Construction.

THE testator in this Cause, after giving his real and personal estate to trustees and declaring the trusts upon which they were to hold his personal estate, proceeded thus: "And, as to my freehold and copyhold property, upon trust to receive and apply the rents and profits thereof to the support and maintenance of my dear wife, *Harriet*, and my present and future grandchildren, during the life of my said dear wife; and, immediately, on her decease, upon trust to convey and surrender such freehold and copyhold property unto and to the use of *all my present and future grandchildren as they respect-*

Testator devised his real estates to trustees, in trust to apply the rents for the maintenance and support of his wife and his present and future grandchildren, during the life of his wife, and, on her death, to convey the estates to all his present and future grandchildren, as they respectively attained the age of twenty-five years, to hold to them, their heirs and assigns, as tenants in common.

Held that the trust to convey, was void for remoteness.

Greenwood v Roberts 15 Beav. 98.

1848.

BLAGROVE v. HANCOCK.

ively attain the age of twenty-five years, to hold the same, according to the nature thereof respectively, unto my said grandchildren, their heirs and assigns for ever, as tenants in common and not as joint tenants; and, in case of the death of any of such grandchildren under the age of twenty-five years, the share and interest of such deceased grandchild shall go and belong to such grandchildren or grandchild as attain the said age; and the interest and dividends, rents and profits of any property to which any grandchild may be entitled *or presumptively entitled*, may be applied towards such grandchild's education, support and advancement."

The testator left his wife, and a daughter who was his only child, him surviving. His widow died in July 1848. The bill was filed in August 1848 by the children of the daughter, all of whom were infants: and, the question, upon the argument of a demurrer, was whether the trust for the present and future grandchildren of the testator as they attained twenty-five, was valid or was void for remoteness.

Mr. *Stuart* and Mr. *Chichester*, in support of the demurrer, said that all the testator's present and future grandchildren who should attain twenty-five, were objects of the trust, and, therefore, the trust was void for remoteness. *Leake* v. *Robinson* (*a*), *Porter* v. *Fox* (*b*).

Mr. *Bethell* and Mr. *Murray*, in support of the bill.

Leake v. *Robinson* and *Porter* v. *Fox* related, not to real estate, as this case does, but to personal estate.

(*a*) 2 Mer. 363. (*b*) *Ante*, Vol. VI. page 485.

The cases in which devises are held to be too remote, are of two descriptions: first, where the testator postpones the vesting of the devise beyond the limits of the rule against perpetuities: secondly, where, although he has given immediate vested interests, the devise is to a class of persons some of whom, possibly, may come into existence beyond the limits of the rule. The first question, then, in this case, is, Has the testator postponed the vesting until his grandchildren attain twenty-five? We say he has not. He, first, directs the trustees to apply the rents of his estates for the maintenance of his grandchildren during the life of his wife;—which is alone sufficient to give them vested interests: and, then, he directs the trustees, to convey the estates, immediately on the decease of his wife, to his grandchildren *as* they attain the age of twenty-five. If the devise had been to the grandchildren who should attain twenty-five, or to such of them as should attain that age, it would have been too remote; the attaining of twenty-five being a condition precedent to the vesting. But the words, 'when' and 'as,' and even the word, 'if,' and the expressions 'when and as' and, 'when and so soon as,' and the like, when used with respect to *real estate*, have been always held not to postpone the vesting, but merely to point out the time when the devisee was to have the enjoyment of the estate. 1 *Jarman* on Wills, 252. *Boraston's case* (*c*), *Doe* v. *Lea* (*d*), *Manfield* v. *Dugard* (*e*), *Goodtitle* v. *Whitby* (*f*), *Denn* v. *Satterthwaite* (*g*), *Doe* v. *Moore* (*h*), *Bromfield* v. *Crowder* (*i*), *Phipps* v. *Williams* (*k*). This last case was followed in *Jackson* v.

(*c*) 3 Rep. 19.
(*d*) 3 T. R. 41.
(*e*) 1 Eq. Abr. 195.
(*f*) 1 Burr. 228.
(*g*) 1 Blacks. 519.
(*h*) 14 East, 601.
(*i*) 1 New Rep. 313.
(*k*) *Ante*, Vol. V. page 44, and 9 Cl. & Fin. 583; see 591, *et seq.*

1848.

BLAGROVE v. HANCOCK.

Marjoribanks (*l*), and in *Milroy* v. *Milroy* (*m*), where the devise was to a class of persons, as it is in the present case. It is true that the testator has used the word, 'presumptively' in the clause of accruer; but all that he meant by it, was to denote that the share of a grandchild, though vested, was liable to be diminished, in amount, by other grandchildren coming into existence. The word 'presumptive' was used, by your Honour, in the same sense, in *Titcomb* v. *Butler* (*n*).

Having thus shown that the testator has not postponed the *vesting*, and that the postponement of the possession does not infringe upon the rule against perpetuity, the second question arises: Has the testator devised to a class some of the members of which may, by possibility, come into existence after the time limited by the rule? With reference to that question, we contend that the devise is to those grandchildren only who should be born during the life of the testator's wife. But we submit that, if the words are taken in their most extensive sense, that is, as including all the grandchildren whensoever born, the devise would not be too remote; for a man's grandchildren must come into existence during a life or lives in being at his death. The life of the tenant for life has nothing to do with this branch of the argument, except in the event of her surviving all the testator's children; and then she becomes the life in being. Therefore, the second question falls to the ground; and this is a good devise, so far as remoteness is concerned. The question between the different classes of grandchildren; namely, those born

(*l*) *Ante*, Vol. XII. page 48.

(*m*) *Ante*, Vol. XIV. page 93.

(*n*) *Ante*, Vol. III. page 417; see page 420.

during the life of the testator; those born during the life of his widow, and those born after her death, must be decided at the hearing of the Cause. The question on the argument of this demurrer is: Have the existing grandchildren no right whatever to institute a suit?

The VICE-CHANCELLOR:

I will look at the cases cited, before I deliver my judgment.*

The VICE-CHANCELLOR: 22nd November.

The testator in this case, after devising all his real and personal estate to his wife, his executrix, and to *Henry Hancock*, his executor, and, declaring trusts as to his personal estate, proceeds as follows: "And, as to my freehold and copyhold property, upon trust to receive and apply the rents and profits thereof to the support and maintenance of my dear wife, *Harriet*, and my present and future grandchildren, during the life of my said dear wife; and, immediately on her decease, upon trust to convey and surrender such freehold and copyhold property unto and to the use of all my present and future grandchildren as they respectively attain the age of twenty-five years, to hold the same, according to the nature thereof respectively, unto my said grandchildren, their heirs and assigns for ever, as tenants in common and not as joint-tenants: and, in case of the death of any of such grandchildren under the age of twenty-five years, the share

* The case was twice argued, not because the Vice-Chancellor entertained any doubt upon the question, but in compliance with the request of the Plaintiff's Counsel.

1848.

BLAGROVE v. HANCOCK.

and interest of such deceased grandchildren, shall go and belong to such grandchildren or grandchild as shall attain the said age; and the interests and dividends, rents and profits of any property to which any grandchild may be entitled or presumptively entitled, may be applied towards such grandchild's education, support and advancement."

Now I take the settled rule of law to be, that an executory devise, in order to be good, must be in such a form as that it must, at all events, vest within the compass of a life or lives in being and twenty-one years after. But it is obvious, on the face of these words, that none of the grandchildren who were *in esse* at the time when this testator made his will, might ever be objects of his bounty: for they might all have died in his lifetime, and there might be none to take except those who were born not only after his death, but after the death of the tenant for life; or the class of persons to take, might be composed partly, if not wholly, of individuals born after the death of the testator and after the death of the tenant for life.

In the course of the argument, it was strongly pressed upon my attention, that the children of the testator, from whom the takers were to derive their existence, must be *in esse* at the death of the testator: but it is obvious that the intended takers, or some of them at least, might not attain twenty-five until after the lapse of more than twenty-one years from the death of the survivor of the testator's children.

After the most deliberate consideration of the words of this will, my opinion is that I should be doing violence to the rule so clearly laid down by Sir *W.*

1848.

BLAGROVE v. HANCOCK.

Grant in *Leake* v. *Robinson*, if I were not to hold that the trust in question in this case, is void for remoteness. In *Leake* v. *Robinson* the attention of Sir *W. Grant* was called to the fact that some of the legatees might attain the prescribed age during the lifetime of the tenant for life; but his answer to that, was that some of them might not.

The demurrer, therefore, must be allowed.

LAW *v.* URLWIN.

1848: 13th and 14th November, and 2nd December.

Vendor and Purchaser. Title. Mortgagor.

BY an indenture dated the 4th of August 1817, *Ann Emmett* and *Philip William Urlwin* demised a piece of ground in the parish of *Newington*, *Surrey*, and two messuages erected thereon, one of which was, afterwards, numbered four, and the other, five, to *William Peacock* for seventy-two years from the 25th of March then last, at two yearly rents of 10*l.* each, one payable to *Ann Emmett*, her heirs or assigns, for her moiety of the demised premises, and the other payable to *Urlwin*, his heirs or assigns, for his moiety of the same premises.

P. being lessee of two houses, underlet one to *S.* and covenanted to indemnify her against the rent reserved by the original lease. *S.* bequeathed that house (which was numbered four) to *P.* in trust for *L.* and appointed *P.* her executor. *P.*, as the executor and trustee of *S.*'s will, executed a deed which purported to be an *assignment*, by him to *L.*, of number four, for the residue of the term granted to *S.* After that, *P.* bequeathed the two houses to his executors, upon certain trusts. After his death, his executors and trustees demised the house number four to *L.*, for the then remainder of the term granted to *S.* Held that *L.* could not make a good title to that house: because the legal estate was merged by the bequest made by *S.* to *P.*, the immediate reversioner, and, therefore, the *assignment* executed by *P.* was inoperative; and because the demise made by the executors and trustees of his will, was a breach of trust.

1848.

LAW
v.
URLWIN.

By an indenture dated the first of September 1817, *Peacock* demised the messuage numbered four, to *Mary Sage*, for the term granted by the indenture of August, wanting seven days, at the yearly rent of 10*l.* 4*s.*, and covenanted, with *Mary Sage*, for quiet enjoyment, and to pay the rent and perform the covenants reserved and contained in the indenture of August, and to indemnify *Mary Sage* therefrom, and to produce the indenture of August, when required. *Mary Sage*, by her will dated the 5th of February 1822, bequeathed the messuage numbered four, to *Peacock*, upon certain trusts of which the Plaintiff became the sole object on attaining twenty-one; and appointed *Peacock* her executor. She died in April 1824, and *Peacock* proved her will. By an indenture dated the 9th of April 1844, and made between the Plaintiff of the one part and *Peacock* of the other part, after reciting the indenture of September 1817 and the will and death of *Mary Sage*, and that the Plaintiff, having attained twenty-one on the sixth of April then instant, had requested *Peacock*, *as the executor and trustee of Mary Sage's will*, to *assign* to him the messuage numbered four, for the then residue of the term of seventy-two years wanting seven days: *Peacock*, as such executor and trustee, assigned that messuage, to the Plaintiff, for the residue of the last-mentioned term, subject to the rent and covenants reserved and contained in the indenture of September 1817, on the part of the lessee to be paid and performed: and *Peacock* covenanted that he had not encumbered the assigned premises; and the Plaintiff covenanted, to pay and perform the last-mentioned rent and covenants, and to indemnify *Peacock* therefrom. *Peacock* died in November 1844, having, by his will dated in February of the same year, bequeathed the premises demised to him by the indenture of August 1817, (which he

described as his two leasehold messuages or tenements and premises, numbered four and five, with the yards, gardens, outbuildings and appurtenances thereto belonging, situate in Grosvenor Place, Camberwell Road, in the county of Surrey,) to *R. Hunt* and *J. Wilkes*, subject to the life interest of his wife *Fanny Peacock*, therein, upon certain trusts for the benefit of *Hunt* and his wife, and, after the decease of the survivor of them, in trust for the children of his half-brother, *William Brown:* and he appointed his wife and *Hunt* and *Wilkes*, his executors; and they proved his will.

In November 1846, the Plaintiff sold the messuage numbered four, by auction, to *Philip William Urlwin*, one of the parties to the indenture of August 1817, and who was at the time of the sale and still continued to be solely seised of the reversion in fee of the messuage. The particulars of sale described the messuage as a valuable *leasehold* estate producing an improved rent of 52*l.* 10*s. per annum*, let to a highly respectable tenant at a rent of 63*l. per annum*, for a term of seventy-two years from the 25th of March 1817, whereof forty-three years were unexpired on the 25th of March 1846, subject to *the ground-rent* of 10*l.* 4*s. per annum*: and the fourth condition of sale was that the vendor should, within fourteen days from the sale, deliver, to the purchaser, *an abstract of the indenture of lease under which the premises were held* and of all *consequent* deeds, evidences and writings, but not of any previous deeds or writings, nor should any such or the superior *leaseholder's* or freeholder's title be required or inquired into: the seventh condition provided that, if there was any error or omission in the particulars, it should not vitiate the sale, but a compensation should be made or taken as the case might require.

1848.

LAW
v.
URLWIN.

After the abstract had been delivered, and perused on *Urlwin's* behalf, an indenture dated the 22nd of February 1847 was made between Mrs. *Peacock*, *R. Hunt* and *J. Wilkes* of the one part, and the Plaintiff of the other part, which, after reciting the indenture of September 1817, the will and death of *Mary Sage;* and that the Plaintiff had attained twenty-one and thereby, become, *in equity*, entitled, in possession, to the messuage numbered four; and after reciting the indenture of the 9th of April 1844, and the will and death of *Peacock;* and that the Plaintiff had agreed to sell the messuage, and that the purchaser *had objected to complete his purchase upon the ground that, by the bequest of the messuage contained in the will of* Mary Sage, *and the alleged assent of* Peacock, *as her executor, thereto, the residue of the term created by the indenture of September* 1817, *became merged in the reversion immediately expectant on the residue of the said term, which residue was vested in Peacock* as the lessor of the premises demised by the indenture of September 1817; and that the Plaintiff, in order to enable him to make a legal title to the messuage for the residue of the term created by the last-mentioned indenture, had requested Mrs. *Peacock*, *Hunt* and *Wilkes* to make such demise of the messuage as was thereinafter contained, which they had agreed to do. It was witnessed that, in pursuance of such agreement and in consideration of the premises and of the rent, covenants and agreements thereinafter reserved and contained, and on the part of the Plaintiff his executors &c., to be paid and performed, Mrs. *Peacock*, *Hunt* and *Wilkes* demised the messuage to the Plaintiff, for forty-two years and the quarter of another year wanting seven days, to be computed from the 26th of December then last, at the rent of 10*l.* 4*s.*: and, by the now stating indenture, the Plaintiff entered into the

1848.

LAW v. URLWIN.

same covenants with Mrs. *Peacock*, *Hunt* and *Wilkes* as *Mary Sage* had entered into, with *William Peacock*, by the indenture of September 1817: and Mrs. *Peacock*, *Hunt* and *Wilkes* covenanted, with the Plaintiff, for quiet enjoyment, for payment of the rent and performance of the covenants reserved and contained in the indenture of the 4th of August 1817, "under which *Peacock* held the messuage hereby demised, with others, for a longer term than is hereby granted;" and to indemnify the Plaintiff from such rent and covenants; and to produce the indenture of August 1817. The indenture of February 1847 then provided that Mrs. *Peacock*, *Hunt* and *Wilkes* should not be subject to any greater liability under the covenants thereby entered into by them, than they would have been subject to, as *Peacock's* personal representatives, under the covenants entered into by him by the indenture of September 1817, if those covenants had remained in force.

Notwithstanding the execution of the deed of February 1847, Mr. *Urlwin* refused to complete his purchase; because he was advised that the title to the messuage, as well under the deed of September 1817 as under that of February 1847, was doubtful; and that, in a suit for specific performance, the contracting parties only could be brought before the Court; and, in the absence of the parties beneficially entitled under *Peacock's* will, the Court could not decide either that *Peacock* became, after the merger, a trustee, for the Plaintiff, of a legal interest in the messuage commensurate with the underlease of September 1817 (as had been suggested by the Plaintiff's conveyancer) or that, as between Mr. *Urlwin* and the parties beneficially entitled under *Peacock's* will, the lease of February 1847 was a rightful dealing with *Peacock's* estate.

1848.

LAW v. URLWIN.

Under these circumstances, the bill in this Cause was filed to compel a completion of the purchase; and, an order, referring the title to the *Master*, having been made, the Defendant carried in the following objections:

"In the printed particulars and conditions of sale, the messuage and premises, the subject of the sale, are described as being held on lease for a term of seventy-two years from the 25th of March 1817, whereof forty-three years were unexpired on the 25th of March 1846, subject to the ground rent of 10*l.* 4*s.* *per annum*: whereas it appears, by the abstract of title, that the premises were (subject to the fourth objection hereinafter mentioned) held for a term of seventy-two years, wanting seven days, from the said 25th of March 1817; and it also appears that the premises were not (as described in the particulars of sale) held on lease; but that the same were held on an underlease, namely, the indenture of the first of September 1817: and also it appears that the premises were not subject to a ground rent of 10*l.* 4*s.* *per annum*; but that the same, together with other premises, were under the indenture of the fourth of August 1817, subject to two entire and unapportioned rents of 10*l.* and 10*l.*: and the Defendant therefore objects to the title;

"First, because no title hath been shown to the premises as being held on *lease:*

"Secondly, because it hath not been shown that the premises are held on lease for a term of *seventy-two years* from the 25th of March 1846.

"Thirdly, because it hath not been shown that the

premises are subject to a ground rent of 10*l.* 4*s.* *per annum.*

"Fourthly, because it appears, by the abstract, that *Mary Sage*, the termor of the premises for the term of seventy-two years wanting seven days, under the indenture of the first of September 1817, bequeathed the premises, to *William Peacock*, for all her interest therein, upon certain trusts; and that she appointed *Peacock* sole executor of her will; that her will was duly proved, in the proper ecclesiastical court, by *Peacock*; that, by virtue of such will and probate, and of the assent of *Peacock*, as such executor, to the bequest to him as such trustee, or by other means appearing on the abstract, the legal interest in the term of seventy-two years wanting seven days, became merged or extinguished in the reversion of the premises immediately expectant on the last-mentioned term, and which reversion was then vested in *Peacock*.

"Fifthly, because it appears that the indenture of February 1847, was not authorized by the trusts and provisions in the will of *Peacock*, and it does not appear that that indenture was made with the concurrence of the parties beneficially entitled to the premises under the will of *Peacock*, or that the new demise made by that indenture, was consistent with the interests of the parties so beneficially entitled.

"Lastly, because the covenants contained in the indenture of February 1847, on the part of the lessors therein named, were, on the acceptance thereof by the Plaintiff, a satisfaction or discharge of the covenants, contained in the indenture of September 1817, on the part of the lessor therein named, and that the former covenants are

1848.

LAW v. URLWIN.

not of equal value with the latter, inasmuch as the burthen of proof on the part of the covenantee named in the indenture of February 1847, is increased."

The *Master* reported against the title. The Plaintiff excepted to his report.

Mr. *Bethell*, Mr. *Torriano* and Mr. *Kemp*, in support of the exceptions, said, first, that, supposing the term granted to Mrs. *Sage*, was merged, at Law, in *Peacock's* reversion, it did not merge in Equity: *Denn* v. *Kemeys* (*a*), *Saunders* v. *Bournford* (*b*): and that the merger of the legal estate, if it took place, had been effectually remedied by the deeds of April 1844 and February 1847: but that, in fact, there had been no merger even at Law; for *Peacock* was entitled to the reversion, beneficially, but, as to the term, he was only a trustee: Secondly, that, though the messuage was described, in the particulars of sale, as being held on lease, the fourth condition of sale plainly showed that it was held under an underlease; and the Defendant must have known that fact; because he was the owner of the reversion in fee: Lastly, that the misdescription as to the length of the term, was a subject of compensation under the seventh condition.

Mr. *Cooper* and Mr. *Terrell*, sen. for the Defendant, said that the messuage was described, in the particulars and conditions of sale, as being held on lease and subject to a *ground* rent, and that a Court of Equity would not compel a party who had contracted to purchase a lease, to take an underlease (*c*): that, by the bequest made by Mrs. *Sage's* will, to *Peacock*, who was her exe-

(*a*) 9 East, 366.
(*b*) Finch's Rep. 424.
(*c*) Sugd. on Vend., 9th edit., page 290; see 375.

cutor and the owner of the immediate reversion, and by *Peacock* having assented to that bequest, not only had the term granted to Mrs. *Sage*, become merged, but all the covenants entered into by *Peacock* with her, were at an end, and the term had become part of his assets and subject to his debts and incumbrances; and, if there were no debts or incumbrances, it belonged to his residuary legatees: that the effect of the deed of April 1844, was not (as the Counsel for the Plaintiff had contended) to resuscitate the term; for that deed did not contain the words, 'grant, bargain and sell,' as the deed in *Denn* v. *Kemeys* did; but the only operative word in it, was, 'assign,' and, consequently, it was nothing but an assignment, and an assignment of what had ceased to exist: that all the *cestuis que trust* under *Peacock's* will, were not parties to the deed of February 1847, and, therefore, that instrument had not the effect which the Plaintiff's Counsel had ascribed to it; *Evans* v. *Jackson* (*d*): that the Plaintiff had contracted for a lease containing the covenants of *Peacock*; but the covenants in the deed of February 1847 were not his covenants but the covenants of his executors: that the purchased property was described as being subject to a ground rent of 10*l.* 4*s.*; whereas it turned out to be subject to two ground rents of 10*l.* each, and the Court would not compel the Defendant to take an indemnity as to one of them; *Balmanno* v. *Lumley* (*e*): that the fact of the purchaser being the reversioner in fee, was immaterial; for a reversioner could not be taken to have notice of an underlease granted by his lessee.

Mr. *Torriano*, who replied in the absence of Mr. *Bethell*, said that *Peacock's* covenants in the indenture

(*d*) *Ante*, Vol. VIII. page 217.
(*e*) 1 Ves. & Beam. 224.

1848.

LAW
v.
URLWIN.

of September 1817, still remained in force, though they had become covenants in gross.

2nd December.

The VICE-CHANCELLOR:

In this case it is necessary to state what the title really was upon which the question arises.

It appears that a lease was made, by two persons, to *William Peacock*; for a term of seventy-two years from a given day; and, by that lease, there was a reserved rent of 10*l.* to one of the lessors, and a rent of 10*l.* to the other of the lessors. In the month of September 1817, *Peacock* made a sub-lease to *Mary Sage*, which was for the whole of the term originally granted except seven days; and, by that sub-lease, a rent of 10*l.* 4*s.* was reserved. It appears that *Mary Sage* made her will shortly afterwards; and, by her will, she gave the sub-leasehold interest which she held, to *Peacock*, in trust, in the events that happened, for the vendor, *Caleb Law*. At the time of her death, *Law*, the vendor, was an infant, and he did not come of age until some time in the year 1844; and then an instrument was made on which some observations arise. First of all, we have to consider what was the true effect of the bequest made, by *Mary Sage*, of her sub-leasehold interest to *Peacock*, who was her lessor. Now my notion is that the true effect of her will was to create a merger of the legal estate which she had in the sub-leased tenement, but, nevertheless, to throw upon her executor, who assented to the bequest, and took it, according to the terms of the will, in trust, an obligation to allow those persons who were named as the *cestuis que trust*, to have the

beneficial enjoyment without the legal estate, commensurate with such interest as they could have taken under the sub-lease itself, provided it had been bequeathed to them.

That being the true state of the case, it appears that, in the year 1844, an indenture was executed between *Peacock* of the one part, and *Caleb Law*, the beneficial legatee under *Mary Sage's* will, of the other part; and, after reciting the sub-lease of September 1817, the will of *Mary Sage*, and that *Caleb Law* had come of age, and had requested *Peacock* to assign to him the premises for the residue of the term contained in the sub-lease, and that *Peacock* had agreed so to do; it was witnessed that, in pursuance of that agreement, *Peacock*, as such executor and trustee, did assign the sub-leased tenement, to *Caleb Law*, his executors, administrators and assigns, for the residue then to come of the term of seventy-two years wanting seven days, at the rent and subject to the covenants in the indenture of first of September 1817, on the part of the lessee, to be paid and performed: and then there was a covenant, by *William Peacock*, that he had done no act to encumber.

I state it with this particularity, for the purpose of making this observation; that it appears to me, on the face of the instrument itself, that it can, in no way whatever, be taken to be anything else but what it professes to be—that is, an assignment; because it is utterly inconsistent with the intention of making a new original lease, that, in the first place, there should be such a recital as is contained in the instrument, and, in the next place, that *Peacock* should covenant that he had not encumbered. Both the phraseology of the recital, and the covenant that he had not encumbered, demonstrate

1848.

LAW
v.
URLWIN.

that it was the intention of the parties to the instrument, that it should be an assignment, provided it could be one. But it cannot be taken as an assignment: the thing attempted to be assigned was absolutely gone. But, still I apprehend that the equity of *Caleb Law*, to have the beneficial interest during the continuance of the sub-lease, remained.

That being the state of the title, *Caleb Law* offers the tenement for sale by auction, with certain particulars and conditions of sale; and, in the particulars of sale, his interest is described as a valuable leasehold estate, producing an improved rent of 52*l.* 10*s. per annum*, let to a highly respectable yearly tenant, who pays all taxes and rates, at a rent of, *per annum*, 63*l.*; held on lease for a term of seventy-two years from 25th of March 1817, whereof forty-three years were unexpired on 25th March 1846, subject to the ground-rent of, *per annum*, 10*l.* 4*s.*, meaning that rent which was reserved upon the sub-demise.

Some proceedings then took place on the abstract; and the parties who advised Mr. *Law*, were sensible that there was a defect in the title; which they cured by an instrument dated in February 1847; by which the executors and trustees of *Peacock's* will, who had in them the whole legal estate of the original lease, make a new lease commensurate, in point of duration, with the sub-lease, provided it had been in existence: and that is the title which is offered to the purchaser. The parties went into the *Master's* office on the common reference on a bill being filed for specific performance; and the *Master* is of opinion that the title is bad. The question that is brought before me on the exceptions, is whether that finding is right or not.

1848.

LAW
v.
URLWIN.

Now my opinion is that that finding is perfectly correct; because, inasmuch as, by the will of *Peacock*, who appointed the parties that were named as the lessors in the indenture of February 1847, his executors, he has given his leasehold interest, subject to a life estate for his wife, (though I do not find, on the face of the abstract, that anything was given to her;) but, subject to the life estate of the wife, it is given in trust for *Hunt* and wife, with remainder in trust for the children of a person named *Brown*. But the executors and trustees of *William Peacock's* will, had no authority, whatever, to part with the legal estate in the way in which they have done. They were bound, in pursuance of *Peacock's* will, to retain the whole legal interest during the existence of the first lease; subject only, as I have said before, to the equity which was derived, under *Mary Sage's* will, for *Caleb Law*, who was one of the *cestuis que trust*, and who, eventually, became solely entitled during such time and under such terms as were to be found in the original sub-demise. But, however, as they have thought proper to part with the legal estate in this way, my opinion is that the vendor, Mr. *Caleb Law*, though he has a good equitable title, has, unquestionably, a bad legal title; for the legal estate may be withdrawn from him, provided the persons who claim under the will of *William Peacock*, think proper to file a bill for that purpose. The title is therefore bad.

That being the case, the only remark which I shall make with regard to the two rents of 10*l.* each, which were reserved by the original lease, is that, according to the terms of the original sub-lease, *Peacock* covenanted to indemnify the sub-lessee from those rents; and, by the indenture of February 1847, the persons who were the executors and trustees of *Peacock's* will, cove-

1848.

LAW v. URLWIN.

nanted to the same effect. But I apprehend that this Court never can enter into the question whether the covenant which binds the assets of the executors and trustees of *William Peacock*, is or is not an equivalent for the original covenant by *Peacock*, which bound his assets. But the truth is that that covenant was gone, at Law, by the merger of the sub-lease; but still it remained in Equity.

My opinion, upon the whole, is that this is a title that cannot be forced on a purchaser, and that the exceptions must be overruled in the usual way.

1848: 16th November.

Costs. Practice.

RASHLEIGH *v.* MOUNT.

A NOTICE of motion to dismiss the bill in this Cause for want of prosecution, was given before the *Vice-Chancellor* of *England*, although the suit was attached to the Court of *Vice-Chancellor Knight Bruce*.

The *Vice-Chancellor* gave the Plaintiff costs as of an abandoned motion.*

* The Reporter was informed by Mr. *Forster*, who kindly furnished him with the above note, that *V. C. Knight Bruce* had refused to make any order in a case like that above reported, on the ground that he had no jurisdiction to make an order in a suit which was attached to the Court of another Judge.

Bain v. L. Eastern Ry Co. 23 Beav. 551.

Wilson v Wilson 1 Sim. N.S. 296.

IN THE MATTER OF LADY ROSSLYN'S TRUST, AND

IN THE MATTER OF 10TH & 11TH VICT. c. 96, for better securing Trust Funds and for the Relief of Trustees.

1848: 17th and 25th November.

Accumulation. Thellusson Act. Construction.

IN May 1817, the Dowager Countess of *Rosslyn* executed a deed by which she directed two gentlemen into whose names she had, shortly before, transferred a sum of Stock, to receive and accumulate the dividends thereof during the joint lives of *James Campbell* and *Jane* his wife, and, after the death of *James Campbell*, if his wife should survive him, to pay the dividends of the capital and accumulations, to her for her life; and after her decease, whether the same should happen in the lifetime or after the decease of her husband, to stand possessed of the capital and accumulations in trust for their daughter, *Charlotte Campbell*; and, if she should die under twenty-one and a spinster, in trust for the Countess, her executors, administrators and assigns.

The Countess died in May 1826. *Charlotte Campbell* attained twenty-one in October 1819 and died, a spinster, in December 1831. Her father died on the 2nd of October 1847, and her mother died on the 29th of December 1848.

On the hearing of a petition presented by *Charlotte Campbell's* personal representative, the question was: To what extent the trust for accumulation was good.

Mr. *Burdon*, in support of the petition, referred to

The Thellusson Act must receive the same construction in the case of a trust for accumulation created by deed, as it has received in the case of a similar trust created by will: and, therefore, where *A.* transferred a sum of stock to trustees, and, by a deed, directed them to accumulate the dividends during the joint lives of *M.* and *N.*, that direction was held to be good for so much only of the joint lives as expired between the date of the deed and *A.'s* death.

1848.

IN THE MATTER OF LADY ROSSLYN'S TRUST.

39th and 40th Geo. III. c. 98,* and contended that the trust for accumulation was good for Lady *Rosslyn's* life and for twenty-one years after her death, inasmuch as the Act authorized a settlor or testator to direct his property to be accumulated for any two or more of the periods mentioned in the Act: 2 *Preston* on Abstracts, 179 *et seq.*; *Hargrave* on the Thellusson Act, 138 *et seq.*; and *Griffiths* v. *Vere* (*a*) where Lord *Eldon* said:

"Suppose the testator had an infant son, a year old, and a brother; and that he expressly directed accumulation for twenty-one years; and, subject to that, gave the estate to his eldest son, and, after the decease of his

* That Act enacts: That no person or persons shall, after the passing of this Act, by any *deed or deeds*, surrender or surrenders, will, codicil or otherwise howsoever, settle or dispose of any real or personal property so and in such manner that the rents, issues, profits or produce thereof shall be wholly or partially accumulated for any longer term than the life or lives of any such grantor or grantors, settlor or settlors, *or* the term of twenty-one years from the death of any such grantor, settlor, devisor or testator, *or* during the minority or respective minorities of any person or persons who shall be living or in *ventre sa mère* at the time of the death of such grantor, devisor or testator, *or* during the minority or respective minorities only of any person or persons who, under the trusts of the deed, surrender, will or other assurances directing such accumulations, would, for the time being, if of full age, be entitled unto the rents, issues and profits, or the interest, dividends or annual produce so directed to be accumulated: and, in every case where any accumulation shall be directed otherwise than as aforesaid, such directions shall be null and void, and the rents, issues, profits and produce of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed.

(*a*) 9 Ves. 127; see 136.

1848.

IN THE MATTER OF LADY ROSSLYN'S TRUST.

eldest son, to the eldest son of his brother: suppose the will contained a direction that the property so accumulated under a direction admitted to be legal, should go to the person who, under those limitations, was to take the estate: it is clear, though the direction to accumulate is only for twenty-one years, yet, under the combined effect of the direction and the law, there might be an accumulation for forty years; for, if the son lived till just about the end of the first twenty years and then died, and the brother had a son a week old, and, by his will, he had provided a maintenance for his own son, under the direction of the law, that accumulation, 4000*l.* for instance, must, during the minority of that son, accumulate in this Court. It is clear then he would take the accumulation of forty years, though the Legislature did not mean that; and there would be no difficulty, consistently with the principle which is to result from this decision, in deciding *that*, whenever it arises. I could put many cases in which the same difficulty would occur, if the direction for accumulation was in the very terms of this will."

Mr. *Craig*, for Lady *Rosslyn's* executors, contended that the trust was good for the joint lives of Lady *Rosslyn* and Mr. and Mrs. *Campbell*, and no longer.

The VICE-CHANCELLOR:

This is quite a new case: it arises on a deed, not on a will: and the question is whether the Act is to receive the same construction in the case of a deed, as it has received in the case of a will. According to Mr. *Burdon's* argument, a settlor is at liberty to take all the periods mentioned in the Act, that is, he may take the whole four, as making one aggregate period. I must consider the case before I decide it.

1848.

IN THE MATTER OF LADY ROSSLYN'S TRUST.

The VICE-CHANCELLOR:

In this case the question arises, for the first time, upon a deed: but it seems to me, on looking at the Act of Parliament, that the same construction must be applied to the Act in the case of a deed, as has been applied to it in the case of a will.

There is nothing in the language of the Statute that absolutely destroys a trust for accumulation, though it be an excess of what the Law allows. The language of the Statute is: "That no person or persons shall after the passing of this Act, by any deed or deeds, &c. &c."

In this particular case it appears that Lady *Rosslyn* transferred a sum of Stock into the names of trustees and directed them to accumulate the dividends during the joint lives of Mr. and Mrs. *Campbell*. Her Ladyship died in May 1826; and Mr. *Campbell* died in October 1847 leaving his wife surviving: and the question is whether the direction to accumulate during the joint lives of Mr. and Mrs. *Campbell*, is wholly void; or whether that construction which Sir *William Grant* put upon the Act for the first time, and which Lord *Eldon* afterwards adopted, is to be applied in this case.

After reading over the Statute and the judgment of Lord *Eldon* in *Griffiths* v. *Vere*, the conclusion which I have come to, is that the trust for accumulation ought to be held to be good for so much of the joint lives as expired during Lady *Rosslyn's* life; and that it ought to be held void for the remainder.

The consequence is that the fund in Court must be divided into two parts; and so much of it as has arisen from accumulations made subsequently to Lady *Ross-*

lyn's death, must be transferred to her executors, and the remainder, after paying the costs of the Respondents, must be transferred to the petitioner.

1848.

GORING *v.* HOWARD.

1848: 17th and 18th November, and 18th December.

Remoteness. Will. Construction. Substituted Bequest.

GEORGE FORBES GORING, the testator in the Cause, by his will will dated the 24th July 1823, gave to *B. Howard* and *James Smale* all his personal estate whatsoever and wheresoever, upon trust to convert the same into money, and invest the proceeds in the public funds, and to pay the interest, dividends, and annual produce of the sum of 1000*l.* New £4 per Cent. Bank Annuities, "for and towards the maintenance of my grandson, *George Goring*, during his natural life; and, after the decease of my grandson, the said *George Goring*, to

Testator gave the residue of his personal estate, to trustees, in trust to pay the income for the maintenance and education of his grandson *George Goring* and such other grandchildren, the children of his son *George Goring*, during their lives, or life; and, after the decease of any or either of his said grandchildren, to pay the share of the income of any or either of them so dying, unto their, his or her issue, if any, *until he, she or they, respectively, attained the age of twenty-five years, and then to pay, transfer and equally divide their parent's share of the residue, between them*, if more than one, and, if but one, then the whole to such one child absolutely. And, in case either of his grandchildren by his son *George, should die without leaving lawful issue at the time of his or her decease*, and without having obtained a vested interest, he directed that the share or shares of him, her or them so dying should go to the survivors or survivor of them, upon the same trusts as were thereinbefore declared, and to be payable and transferable as thereinbefore mentioned.

George Goring the grandson, died a bachelor; leaving three brothers and a sister surviving him.

Held that they were entitled to their deceased brother's share of the income, for their lives: because, though the first gift was too remote, the subsequent one was intended to take effect, not by way of remainder but by way of substitution.

1848.

GORING v. HOWARD.

pay the interest of the said sum of 1000*l.* unto his issue, if any, lawfully begotten, until he, she or they attain *the age of twenty-five years*, and *then* to pay, transfer and equally divide the said sum of 1000*l.* New £4 per Cent. Bank Annuities, between them, if more than one, and, if only one, then the whole to go to such only child; and, *for want of such issue*, then I direct that the interest of the said sum of 1000*l.* New £4 per Cent. Bank Annuities, shall be paid unto such other child or children of my said son, *George Goring*, equally during his, her or their natural life or lives, as shall be then living; and, after the decease of any or either of my said grandchildren, to pay the interest of the said sum of 1000*l.* New £4 per Cent. Bank Annuities, unto his, her and their issue, until he, she or they severally attain the age of twenty-five years (such issue taking only their parent's share); and, as they respectively attain the age of twenty-five years, to pay, transfer and equally divide the said sum of 1000*l.* New £4 per Cent. Bank Annuities, between them, if more than one, and if but one, then the whole to such one child absolutely. And as to all the rest and residue of my personal estate, upon trust to pay the rents, interest and annual produce thereof equally between* for and towards the maintenance and education of my said grandson, *George Goring*, and such other grandchildren, the children of my son, *George Goring*, lawfully begotten, during the term of their natural lives or life; and, after the decease of any or either of my said grandchildren, to pay the share of the rents, interest and annual produce of any or either of them so dying, unto their, his or her issue, if any, lawfully begotten, *until he, she or they respectively attain the age of twenty-five years, and then to pay, transfer and equally divide their parent's share of the residue of my said personal estate between*

* *Sic* in copy will.

1848.

GORING v. HOWARD.

them, if more than one, and, if but one, then the whole to such one child absolutely. And my will and mind is, and I hereby direct and declare that, in case either of my grandchildren by my son, *George Goring*, *shall depart this life without leaving lawful issue at the time of his or their decease, and without having obtained a vested interest*, then I direct that the share or shares of him, her or them so dying, shall go to and belong to the survivors or survivor of them, upon the same trusts as are hereinbefore declared, and to be payable and transferable as hereinbefore mentioned. And as to all my freehold estate, situate between *Dowlas Common* and *Waterloo Street* in the parish of *St. Giles Camberwell* in the county of *Surrey*, which I purchased of the trustees under an Act of Parliament for the sale of the glebe lands in the parish of *St. Giles Camberwell* aforesaid, I give and devise the same unto the said *B. Howard* and *James Smale* and the survivor of them, his heirs, executors, administrators and assigns, upon trust that the said *B. Howard* and *James Smale* or the survivor of them, his heirs, executors, administrators or assigns, do and shall pay the rent and produce thereof unto my said grandson, *George Goring*, during his natural life; and, after the decease of my said grandson, *George Goring*, upon trust to pay the rent and produce of my said freehold estate, unto the issue of his body, if any, lawfully begotten, during their natural lives or life, equally between them, if more than one, but, if only one, then the whole of the said rent and produce to go and belong *to such only child;* and, *for want of such issue*, upon trust to pay the rent and produce of my said freehold estate unto and equally between such children of my said son, *George Goring*, as shall be *then living*, during their natural lives, if more than one, but, if only one, then the whole of the rent and produce to go and belong

1848.

GORING v. HOWARD.

to such only child; and, after the decease of any or either of my said grandchildren, to pay the rent and produce of my said freehold estate, unto and equally between, his, her and their issue, during his, her or their natural lives, such issue taking only their parent's share, with benefit of survivorship; and, after the decease of the whole of the issue of my said grandchildren, or in case there shall be no issue of my said grandchildren, any or either of them, then upon trust for my own right heirs for ever."

The testator died shortly after the date of his will, leaving his son *George Goring*, the elder, his heir and sole next-of-kin. *George Goring* the elder had only five children, all of whom were born before the death of the testator; but none of them had attained twenty-one at his death.

The suit was instituted by the four youngest children, against *Howard*, *Smale*, *George Goring* the elder and *George Goring* the younger, to have the trusts of the will performed. By the order on further directions, dated the 11th of June 1831, the Court declared that *George Goring* the younger was entitled to the interest and dividends of 1000*l.* part of 1015*l.* £3 10*s.* per Cent. Bank Annuities, standing in the name of the *Accountant-General* in trust in the Cause, and to the rents and profits of the testator's freehold estates, for the term of his natural life: that the testator, by the word 'grandchildren,' in the gift of the residue, meant his own grandchildren being children of his son *George Goring* the elder; and that the Plaintiffs and the Defendant *George Goring* the younger, were entitled to receive the interest of the residue for the term of their lives.

1848.

GORING v. HOWARD.

The 1015*l.* Stock was afterwards reduced to 920*l.*, in consequence of part of it having been sold for payment of costs; and, by an order dated in 1836, at which time *George Goring* the younger had attained twenty-one, the dividends of the 920*l.* Stock were ordered to be paid to him for his life. On the 22nd of October 1847, *George Goring* the younger died, a bachelor, leaving all his brothers and sisters him surviving. Only one of them had a child; and that child was brought before the Court by supplemental bill.

On the 3rd of November 1848, the four surviving children of *George Goring* the elder, presented a petition praying that the dividends of the 920*l.* Stock* accrued due since the decease of *George Goring* the younger, and which might thereafter accrue due during the lives of the petitioners, might be paid to them; and that they might be at liberty to receive the rents and profits of the testator's freehold estate, during their lives.

Mr. *Chandless*, in support of the petition, admitted that, if the words, 'for want of such issue,' meant, 'for want of issue who should attain twenty-five,' the gift over, of the 1000*l.* Stock, to the other children of the testator's son, *George Goring* the elder, was void for remoteness; but he contended that the true construction of those words, especially when taken in connection with the words that immediately preceded them, namely, "and if only one, then the whole to go to such only child," was, "in case my grandson *George Goring* shall not have a child:" and, consequently, that the gift over, was good. *Davies* v. *Fisher* (*a*).

* This sum constituted the whole of the residue.

(*a*) 5 Beav. 201.

1848.

GORING v. HOWARD.

Mr. *Bethell*, for *George Goring* the elder, who was the sole next-of-kin and heir of the testator, said that the word, 'then,' was equivalent to, 'at,' and that a gift to a class of individuals at the age of twenty-five, was too remote; that all the subsequent gifts were made dependent upon that gift; and, therefore, they also were too remote; *Bull* v. *Pritchard* (*b*): and that the gift of the residue was not distinguishable from the gift of the 1000*l.* Stock.

Mr. *Younge*, with Mr. *Bethell*, said that there was no gift to the issue of *George Goring* the younger, except in the direction to pay and transfer; and that the payment and transfer were not to take place until the issue attained twenty-five; and, therefore, there was no gift to the issue, except at the age of twenty-five; and that the words of the gift over, "for want of such issue," meant for want of issue who should attain twenty-five.

The *Vice-Chancellor*, in the course of the argument, expressed it to be his opinion that the gift over of the 1000*l.* Stock was too remote; and said, with respect to the gift over of the residue, that if it was a gift by way of remainder, it also was too remote; but the question was whether it was not a gift by way of substitution.

When the argument was concluded, his Honour said he would read the will over before he decided the case.

(*b*) 1 Russ. 213.

1848.

GORING
v.
HOWARD.
18th December.

The VICE-CHANCELLOR:

The question is whether the petition in this case, is right in what it asks?

The testator, *George Forbes Goring*, by his will, gave all the residue of his personal estate to trustees, upon trust to pay the rents, interest and annual produce thereof equally between for and towards the maintenance and education of his grandson, *George Goring*, and such other grandchildren, the children of his son, *George Goring*, lawfully begotten, during the term of their natural lives or life; and, after the decease of any or either of his said grandchildren, to pay the share of the rents, interest and annual produce of any or either of them so dying, unto their, his or her issue, if any, lawfully begotten, until he, she, or they respectively, attained the age of twenty-five years, and then to pay and transfer and equally divide their parent's share of the residue of his said personal estate, between them, if more than one, and, if but one, then the whole to such one child absolutely. And his will and mind was, and he thereby directed and declared that, in case either of his grandchildren by his son *George Goring*, should depart this life without leaving lawful issue at the time of his or their decease, then the trust-property should go over: and there is a similar devise with respect to the real estate.

The facts of the case are these:—*George Goring* the younger, was the eldest son of *George Goring* the elder, who was the only son of the testator; and, very lately, *G. Goring* the younger died, without leaving any issue at the time of his death; and the four other grandchildren, who were named to take on the particular contingency of *G. Goring* the younger, dying without leav-

1848.

GORING v. HOWARD.

ing issue at his death, have presented this petition praying to have that fund *which represents the personal estate so bequeathed*, applied in this way; by way of giving to them the interest during their lives. And the only question in this case, is whether the limitation over which follows the limitation made to *George Goring* the younger, for life, with remainder to his issue who should attain twenty-five, is good in the event that has happened.

I remember that, at the time when the case was argued, it struck me that the limitation over was good. I have since read the will carefully over, and it appears to me that this case is exactly within the rule which was, first of all, laid down in *Longhead* v. *Phelps* (*c*), and which amounts to this, that, where there is a limitation, and that does not take effect at all, and then another limitation in lieu of it, though the first is bad, yet the second may be good. The case is a very remarkable one; because it seems that the validity of the title was argued with reference to the trust of a term. Now how the validity of the legal title could depend on the trust of a term, one does not exactly see; but so it was. The trust of the term, in that case, was that, in case *John Phelps* should happen to die without issue male of his body on the body of *Mary* (his then intended wife) begotten, or if all the issue male between them should die without issue and there should be issue female, and so on, then there was a trust by way of substitution: and the Court, without hearing Counsel for the Defendants, were clear that the first part of the contingency was good, *viz.*, in case *John* and *Mary* died without leaving issue male; and, as that happened in fact to be the case, they would not enter into the consideration how far the other branch of the contingency might have been

(*c*) 2 Sir W. Blackst. 704.

supported, which could only come in question in case *Richard* had survived both his parents. Now, though there is that observation to be made on this case which I just now made, yet I know that it is considered as a ruling authority.

Then, in *Leake* v. *Robinson* (*d*), there was a bequest of the residue in two moieties, with limitations very much like those which are here contained. One moiety was given to the *Mitfords*, and the other, to the *Robinsons;* and Sir *William Grant* says (*e*): "The consequence is that, subject to Mr. *Mitford's* life interest, it belongs to the testator's next-of-kin. The fate of the other half rests in contingency." The *Mitford* moiety was that which was given for life, but with remainder to such a class as could only take by living to the age of twenty-five; and it was held that though some might take separately, yet as they were to take as a class, none could take; for none could take except all had attained twenty-five. Then, after saying that the fate of the other half rested in contingency, Sir *William Grant* adds: "If Mrs. *Robinson* should die without leaving issue, it is well given over to the children of Mrs. *Mitford.*" That is, in the alternative. It appears to me to be exactly the present case.

And, as *George Goring*, the younger, died without having issue living at his death, my opinion is that the petition is right in what it asks with respect to both the real estate and the personal estate; and, therefore, I shall make an order according to the prayer of it.

(*d*) 2 Mer. 363. (*e*) Ibid. 394.

ARNOLD *v.* ARNOLD.

1848:
18th November.

Legacy. Will. Construction.

Testator bequeathed to his daughter, 15,000*l.*, to be kept in trust, by his executors, till she should attain twenty-one or marry with the consent of her mother and half of his executors then living, whichever might happen first, when the sum, with the accumulated interest, *was to be settled* on her. The daughter attained twenty-one, without having married.

Held that the legacy was not directed to be settled, except in the event of her marrying under twenty-one, with the consent of her mother and half of the testator's executors; and that, as the legacy was, in the first instance, given to her absolutely, she was entitled to it absolutely.

GEORGE ARNOLD, the testator in this Cause, by his will bearing date the 18th of September 1828, bequeathed as follows: "I give and bequeath to my dear child, *Sophia Mary Arnold*, 15,000*l.* sterling, *to be kept in trust by my executors till she shall attain the age of twenty-one years or marry with the consent of her mother and the half of my executors then living, whichever may happen first; when this sum*, with the accumulated interest, *is to be settled on the said Sophia Mary Arnold*; but, failing her attaining the age of twenty-one years or having issue by such marriage, then the sum is to devolve, one half, to my residuary legatee, and the other half, to my other child not yet born. In like manner I give and bequeath a similar sum of 15,000*l.*, to any child of which my dear wife may be pregnant at my death, under the same stipulations. * * * * The whole of my remaining property, real and personal, of every description whatsoever, including the lands which belong to me in *Upper Canada*, to be divided into three equal parts; one part to each of my dear brothers, *James* and *William Arnold*, and *Sophia Phipps*. In case my said brothers and sister should not survive me or having legal issue living at my death, then his, her or their shares to devolve, in equal portions, to the survivors, as well as the shares that may have been devised to such their issue. Should none of them marry or attain the age of twenty-one years, the benefit of in-

terest, however, to be enjoyed, intermediately, by such issue. Should *Pownoll Phipps* survive my brothers and sister and their legal issue unmarried or under age, *Sophia's* third portion to devolve to him."

The testator died on the 1st of October 1828. His daughter *Sophia Mary*, who was still a spinster, attained twenty-one on the 1st of August 1848, and, shortly afterwards, presented a petition, praying that the sum of stock which was standing to the account of her legacy, might be transferred to her.

Mr. *Bethell* and Mr. *Piggott* appeared in support of the petition.

Mr. *Joshua Williams*, for the testator's executors, submitted that the stock ought not to be transferred to the petitioner, but ought to be settled in trust for her and her issue, and, failing her issue, in trust, as to one half, for the testator's brothers and sister, and, as to the other half, for the child of the testator who was born after the date of his will.

Mr. *Terrell* appeared for another party.

Young v. *M'Intosh* (*a*), *Laing* v. *Laing* (*b*), and *Jervoise* v. *The Duke of Northumberland* (*c*), were referred to.

The *Vice-Chancellor*, after observing that the testator seemed to have had but a very confused notion as to

(*a*) *Ante*, Vol. XIII. page 315.
(*b*) *Ante*, Vol. X. page 445.
(*c*) 1 Jac. & Walk. 559.

1848.

ARNOLD v. ARNOLD.

what he intended, said that the legacy was first given to the petitioner absolutely, and there was no direction to settle it, except in the event of her marrying under age, with the consent of her mother and half of the executors; and, as that event had not happened, there was nothing to take away her right under the first gift; and, therefore, he should direct the stock to be transferred to her.

1848: 18th November.

Married Woman. Will.

A married woman having power to dispose of a fund by will, made a will disposing of that fund and also of another fund over which she had no power, and appointed her husband her executor, and he proved her will generally.

Held that, as to the latter fund, the will was valid as being made *ex assensu viri.*

IN THE MATTER OF THE TRUSTEES' RELIEF ACT, 10TH & 11TH VICT. c. 96.

EX PARTE FANE.

A MARRIED lady who had a power reserved to her to dispose of certain funds by will, made a will which was a disposition of those funds, and purported to dispose of other funds over which she had no power, and appointed her husband her executor. Her husband proved her will generally, and not merely as to the funds over which she had the power.

The *Vice-Chancellor* held that, as to the funds over which the lady had no power, her will operated as a will made *ex assensu viri.*

Mr. *Bethell*, Mr. *Kinglake*, and Mr. *Smythe*, were the Counsel in the case.

DOBINSON *v.* HAWKS.

1848: 18th and 20th November.

Benefit Building Society. Joint-stock Company.

A joint-stock company cannot hold shares in a benefit building society established under 6th & 7th Will. IV. c. 32, for regulating benefit societies.

THE bill was filed by the trustees of a joint-stock brewery company, to redeem a mortgage made by the company to the trustees of a benefit building and investment society, which had been established under the 6th and 7th Will. IV. c. 32, for regulating such societies.

The mortgage-deed was in the ordinary form; and, accordingly, the Counsel for the Plaintiffs insisted that their clients were entitled to redeem upon the usual terms. But the Defendants' Counsel alleged that the Plaintiffs, in order to obtain the loan, became shareholders in the building society, and, therefore, they were not entitled to redeem without regard to the liabilities which they had incurred as such shareholders.

Mr. *Bethell* and Mr. *Bates* appeared for the Plaintiffs; and Mr. *Rolt*, Mr. *Prior* and Mr. *Headlam*, for the Defendants. In the course of the argument, *Silver* v. *Barnes* (*a*) and *Mosley* v. *Baker* (*b*) were referred to.

The VICE-CHANCELLOR:

This is a very simple case.

The Plaintiffs propose that an account shall be taken of what is due on the mortgage, according to the truth of the transaction as it appears on the face of the deed;

(*a*) 6 Bing. N. C. 180.
(*b*) 6 Hare, 87. This case was said to be under appeal before the Lord Chancellor.

1848.

DOBINSON v. HAWKS.

that is, according to the sum of money that was actually advanced. The object of the Defendants is not to have such an account, but to have an account on the footing of what appears in one of the exhibits in the Cause, which contains the whole detail of what I may call a fabricated and hypothetical scheme for the sale of shares.

In order to support the Defendants' view of the case, it must, first of all, be made to appear, plainly, that the Plaintiffs were members of the building society. But the primary evidence, the evidence which the Legislature intended to exist of that fact, is not forthcoming. By the rules of the benefit society, it is directed that the name of each member shall be inserted in a book; and that book would, of necessity, be either in the actual possession of the Defendants, or under their control. But that book has not been produced, nor has any reason been assigned why it has not been produced. And my opinion is that the non-production of it, under the circumstances that appear in this case, must be taken to be conclusive evidence that the Plaintiffs were not members of the building society.

Moreover, if the names of the Plaintiffs had been entered in the book, I think that, attending to what plainly appears to be the policy of the Act of Parliament and the object of the society as expressed in its rules, it would have been a fraud on the Act of Parliament under which the building society was constituted, and a violation of the rules by which it is regulated, to have made them members. It is quite plain that the society was meant, by the Legislature, to be constituted for the benefit of industrious individuals, who might be hoping to make some progress in life, by laying out small sums, to be contributed through the medium of the society, in

the purchase of buildings, in the purchase of land, or in the erection of buildings. There is a little degree of obscurity, or rather I should say, a little degree of negligence, in the wording of the first section of the Act; for it is perfectly plain that, when the Legislature said that the object was to erect or purchase one or more dwelling-house or dwelling-houses, or other real or leasehold estates, they meant to erect houses or purchase estates of small value.

Now then what is the case? Here is a company, established for quite a different purpose, that, for its own purposes, wishes to borrow money; and the arrangement made by the Defendants, was that the money should be advanced on the same footing as if those persons who constituted the brewery company, were actually members of the building society. I have looked over all the rules, and the conclusion which I have come to is that there is nothing whatever which countenances the supposition that persons, jointly, might be shareholders. The expression is uniformly, "his or her;" and it seems to me that it is inconsistent with the object which the Legislature contemplated, (which was to assist individuals,) that persons combining together and forming a joint-stock company, should ever be capable of being members of a benefit building society. Therefore, not only is there no proof that the brewery company were made or attempted to be made shareholders in the building society; but, even if there had been such proof, the thing would have been inadmissible; because, according to my understanding of the policy of the Act, no such thing could take place.

The consequence is that, the case set up by the

1848.

DOBINSON v. HAWKS.

Defendants having totally failed, the accounts must be taken in the usual way; and the Defendants must pay the costs of the suit up to the hearing.

1848: 21st November.

Will. Construction. 'Survivor or Survivors.' 'Issue.'

HAWKINS v. HAMERTON.

CHARLES HAMERTON, by his will dated the 30th July 1799, devised all his real estates to trustees, and bequeathed to them all his monies in the public funds or upon Government securities, and all his *East India* stock, and all other his monies and stocks secured upon the credit of any public company or corporation,

Testator bequeathed a leasehold estate to his son *Charles*; and directed that, if his son should die without issue, the leasehold estate should be considered as part of his residuary estate, and be divided amongst the children of his three daughters, *Isabella*, *Matilda* and *Mary*, as thereinafter mentioned. And he gave the residue of his estate, to trustees, in trust for his son and three daughters, *or such of them as should be living at the death of his wife*, equally, during their lives: and he directed that, after their deaths, the whole of the residue, should be divided amongst *all the children of his said son and daughters*, in equal parts, shares and proportions; and, in case any of his said son and daughters should die without leaving *issue*, that the share of him, her or them so dying, should be divided amongst *the survivor or survivors* of his said children *and their issue*, in the like equal parts, shares and proportions. *Isabella died in the lifetime of the testator's widow*, leaving children. *Mary* died after the widow, leaving children. Then *Charles* died without issue. *Matilda* was still living, and had children. Held that *Isabella's* children were entitled to one fourth of the residue notwithstanding their mother died before the widow; that *Mary's* children were entitled to another fourth; and that *Matilda* was entitled to another fourth, for her life, with remainder to her children; and that, as *Charles* had died without issue, the remaining fourth was divisible into three parts, and one of those parts belonged to *Isabella's* children, another, to *Mary's* children, and the remaining part to *Matilda* for life, with remainder to her children.

Re Corbett's Trusts 1 Johnson 595.
Re Keefe's Will 32 Beav. 129.
Lodge v. Foot 34 Beav. 353
Re Arnold's Trust 10 Eq. 256

1848.

HAWKINS v. HAMERTON.

and all his monies secured by mortgage, bond, note or otherwise, upon trust to sell and dispose of, let, manage and improve his said real and personal estates to the best advantage, and so that the monies arising and produced therefrom, should be, from time to time, placed out and invested, in the names of his trustees, in the public funds or on Government securities, and, upon trust to pay, out of the rents, issues, profits, dividends, annual and other accumulations of his said real and personal estates, to his wife *Ann Hamerton*, an annuity of 450*l.*; and he gave, to his wife, all his household goods, furniture, plate, &c. and the sum of 100*l.*, to be paid within one month after his decease, and then expressed himself as follows:

"I also give and bequeath, unto my son, *Charles Hamerton*, all that leasehold estate which I now hold of and under the Corporation of the City of *London*, situate and being at *Whitefriars Dock*, subject to the payment of the rent and performance of the covenants and agreements mentioned and contained in the lease granted to me thereof from the said Corporation; but, in case my said son shall happen to die *without issue*, then I will and direct that the said leasehold premises at *Whitefriars Dock* shall revert to my said trustees or trustee for the time being, and be taken into and considered as part of my residuary estate and be divided amongst *the children of my three daughters as hereinafter mentioned.*

"I also give and bequeath unto my three daughters, *Isabella*, the wife of *J. S. Killick*, *Matilda*, the wife of *Samuel Hancock*, and *Mary Hamerton*, or to such person or persons as my said daughters shall, from time to time during their natural lives, appoint to receive the

1848.

HAWKINS v. HAMERTON.

same, for the sole, separate, personal and peculiar use and benefit of my said daughters, an annuity or clear yearly sum of 300*l.* each, to be paid to them and each of them, by four equal quarterly payments, on the 24th day of June, the 29th day of September, the 25th day of December and the 25th day of March in every year, the first payment thereof to be made on such of the said days as shall next happen after my decease: And, from and after the decease of my said daughter, *Isabella*, I will and direct that the principal monies from which her said annuity of 300*l.* shall arise and accrue, shall be paid and divided amongst *such children* as she may have by her present husband, the said *J. S. Killick* only, in equal parts, shares and proportions, as they attain their respective ages of twenty-one years: And, from and after the decease of my said daughter, *Matilda*, I will and direct that the principal monies from which the said annuity of 300*l.* shall arise and accrue, shall, in like manner, be paid and divided amongst *such children* as she may have by her present husband, the said *Samuel Hancock*, only, in equal parts, shares and proportions, as they attain their respective ages of twenty-one years: And, from and after the decease of my said daughter, *Mary*, I will and direct that the principal monies from which the said annuity of 300*l.* shall accrue or arise, shall be paid and divided amongst all and every the children which she may have by any future husband or husbands, in equal parts, shares and proportions, as they shall attain their respective ages of twenty-one years: And in case she shall happen to die *without issue*, then such principal sum to be divided amongst the *children* of my said son, *Charles*, and daughters, *Isabella* and *Matilda*, in equal parts and shares, on their attaining their said ages of twenty-one years."

1848.

HAWKINS v. HAMERTON.

The testator then gave pecuniary legacies to his servants and other persons: after which, he proceeded as follows:

"And it is further my will and mind and I hereby direct that, from and after the decease of my said dear wife, *Ann Hamerton*, the said annuity of 450*l.* so given and bequeathed to her during her natural life, and also all the rest, residue and remainder of my said real and personal estates, of what nature or kind soever, not hereinbefore disposed of, and of which my executors and trustees shall and may be possessed by virtue of the trusts in them reposed, and all accumulations thereof, shall be vested in the funds of or in *Great Britain*, or placed out in Government securities at interest, and that the full clear dividends, interest or produce thereof, shall be paid and divided amongst all my children, the said *Charles Hamerton*, and my said three daughters, *Isabella*, *Matilda* and *Mary*, *or such of them as shall be living at the time of the death of my said wife*, in equal parts, shares and proportions, during their natural lives, by even quarterly payments, but the share and interest of my said daughters to be, in nowise, subject or liable to the debts, contracts or engagements of their present or any future husband: And, *from and after the decease of my said son and daughters, then* I will and direct that the whole of such residue and remainder of my estates, with all accumulations thereof, shall be paid and divided amongst *all and every the children of my said son and daughters*, in equal parts, shares and proportions: And in case any of my said son and daughters shall happen to die without leaving *issue*, then I will and direct that the legacy, part or share hereby given and bequeathed to him, her or them so dying without issue, shall go and be divided amongst *the survivor or survivors of my said children*

1848.

HAWKINS v. HAMERTON.

and their issue, in the like equal parts, shares and proportions."

It appeared from the report made in pursuance of the decree, that the testator died in 1800: that his daughter, *Isabella Killick* died in 1804: that his wife died in 1814: that his daughter, *Mary*, married *W. H. Holt* in 1803 and died in 1826; that his son, *Charles* died in 1844, and never had any issue: and that the testator's only other child, *Matilda Hancock*, was still living, and was one of the Defendants in the Cause: that *Isabella Killick* had six children by her husband, *J. S. Killick*, and that all of them were living at the death of the testator and at the death of his widow, and at the death of their mother and that five of them were still living and were Defendants in the Cause: that *Matilda Hancock* had nine children by her husband *S. Hancock*, and that all of them were living at the death of the testator, and that all of them, except one, were living at the death of the testator's widow, and that four of them were still living and were the Plaintiffs in the Cause; that *Mary Holt* had nine children, all of whom were living at the decease of the testator,* at the decease of their mother and at the decease of the testator's widow, and that seven of them were still living and were Defendants in the Cause. It further appeared, from the report, that the personal representatives of such of the deceased children of *Isabella Killick*, *Matilda Hancock*, and *Mary Holt* as had personal representatives, were parties to the suit.

The funds to which the rights of the parties were to

* This finding is inconsistent with the prior finding that the testator died in 1800, and that Mrs. *Holt* married in 1803.

1848.

HAWKINS v. HAMERTON.

be determined on the hearing for further directions, were 3934*l.* 13*s.* 1*d.* Consols, being the testator's residuary estate, and 997*l.* 16*s.* 7*d.* and 238*l.* 18*s.* 1*d.* £3 5*s.* per Cents. which had arisen from the accumulations of *Mary Holt's* and *Charles Hamerton's* shares of the residue, since their respective deaths.

The Cause now came on to be heard for further directions.

Mr. *Bethell* and Mr. *Haddan*, for the Plaintiffs, contended that, as *Isabella Killick* was not living at the death of the testator's widow, her children were not entitled to any share of the residue; that the words, "survivor or survivors" were to be taken in their natural sense, and not as meaning, "other or others," and that, on the death of the testator's widow, his son and his daughters, *Matilda* and *Mary*, who were his only children then living, became entitled to the whole of the residue for their lives, with remainders *to their children*; and that, on the death of the son, the children of *Matilda* and *Mary* became entitled to his share of the residue, as tenants in common. *Brett* v. *Horton* (*a*), *Arrow* v. *Mellish* (*b*), *Leeming* v. *Sherratt* (*c*), *Farrant* v. *Nichols* (*d*).

Mr. *Hodgson* and Mr. *Wickens*, for *Matilda Hancock*, the testator's only surviving daughter, said that the words: "And, from and after the decease of my said son and daughters, *then* I will and direct that *the whole* of such residue and remainder of my said estates, with

(*a*) 4 Beav. 239.
(*b*) 1 De Gex & Smale, 355.
(*c*) 2 Hare, 14.
(*d*) 9 Beav. 327.

1848.

HAWKINS v. HAMERTON.

all accumulations thereof, shall be paid and divided," &c., showed that the testator intended that no division of his residue should take place until the decease of the survivor of his four children, and, therefore, *Matilda Hancock* was entitled, in the events that had happened, to the income of the whole of the residue for her life, and, on her death, her children and the children of her sisters, would take the capital of the residue, *per capita*; 2 Jarman on Wills, 111: *Malcolm* v. *Martin* (*e*), *Pearce* v. *Edmeades* (*f*), *Ashley* v. *Ashley* (*g*), *Tuckerman* v. *Jeffries* (*h*).

Mr. *Rolt* and Mr. *Lewin*, for the children of *Mary Holt*, contended first, that *Isabella Killick's* children were not entitled to any share of the residue; for their mother took no interest in it, and there was nothing, in the will, to show that the testator intended to give anything to the children of a parent who took nothing: in addition to which the testator had directed that, from and after the decease of his *said* son and daughters, the whole of the residue with all accumulations thereof, should be divided amongst the children of his *said* son and daughters; where the word 'said' must mean the son and daughters lastly before spoken of; that is, the son and daughters who should be living at the death of the testator's wife: Secondly, that the testator had said that, in the event of any of his children dying *without leaving issue*, the share of that child should go to the survivor or survivors of them; which implied that, if any of the children died *leaving issue*, the share of that child should not go to the survivors; and that, taking the

(*e*) 3 Bro. C. C. 50.
(*f*) 3 Youn. & Coll. Exch. Ca. 246.
(*g*) *Ante*, Vol. VI., page 358.
(*h*) 4 Bac. Abr. 467.

other parts of the will in connection with that part which related to the residue, the necessary inference was that the testator intended that, on the death of his children who should survive his widow and leave children, the share of each them should go, *immediately*, to his or her children: *Taniere* v. *Pearkes* (*i*), *Willes* v. *Douglas* (*k*), *Arrow* v. *Mellish*, *Brett* v. *Horton*. They added that *Malcolm* v. *Martin* was distinguishable from the present case; for, there, the grandchildren of Mr. *Glass* and Mrs. *Lyon* were intended to take the capital of the 1500*l*., as a class; and the class could not be ascertained until all the children of Mr. *Glass* and Mrs. *Lyon* were dead.

Mr. *James Parker* and Mr. *Pole*, for *Isabella Killick's* children, said:

If there is anything certain in this will, it is that the children of *Isabella Killick* are entitled to a share of the residue.

The testator, when dealing with an interest in the residue which was to come into possession at the death of his wife, says: "And, from and after the decease of my *said* son and daughters," that is, all the four whom he had just before named. He does not add: "Or such of them as shall be living at the decease of my said wife;" nor can the Court import those words into his will. Then he says: "shall be paid and divided amongst all and every the children of my *said* son and daughters." There also, he means the children of his son *Charles*, and of his daughters *Isabella*, *Matilda* and *Mary*, whom he had before mentioned *nominatim*. If *the son* had

(*i*) 2 Sim. & Stu. 383. (*k*) 10 Beav. 47.

1848.

HAWKINS v. HAMERTON.

died in the lifetime of the widow, could it have been argued, for a moment, that, notwithstanding the testator has used the words: "from and after the decease of my said son," the children of the son were not entitled to a share.

Secondly, we contend that *Matilda Hancock* is not entitled to the accumulations of Mrs. *Holt's* share, but that there is an intestacy as to them. For the testator has directed that the share of a deceased child, shall go to the survivor or survivors in one event, namely, the death of a child without issue; which affords an implication that he did not intend the share of a deceased child to survive in any other event. And he has directed *the whole* of his residue to be divided from and after the decease of his son and daughters; which is one, single event; but he has made no disposition as to the income which might accrue, from the share of a child who had died, leaving issue, during the interval between the death of that child and the happening of that one event.

Lastly, as the testator has directed that, on the decease of the survivor of his son and daughters, his residue shall be paid and divided amongst the children of his said son and daughters, we submit that the children of such of them as have left children, take *per capita*.

Mr. *Bethell* replied.

The VICE-CHANCELLOR:

The testator, after providing an annuity of 450*l.* for his wife, and giving her certain specific things, proceeds to deal with a leasehold estate, which he held under the Corporation of *London*: and he gives it to his son, *Charles*, and says: "But in case my son shall happen

1848.

HAWKINS v. HAMERTON.

to die without issue, then I will and direct that the said leasehold premises at *Whitefriar's Dock*, shall revert to my said trustees or trustee for the time being, and be taken into and be considered as part of my residuary estate, and be divided amongst the children of my three daughters as hereinafter mentioned." I point out this as showing that the testator, in that part of his will, evidently intended that his residuary estate should be divided among the children of his three daughters, so that the children of the three daughters should take some interest at least in his residuary estate. Then he proceeds to give an annuity of 300*l.* to his daughter, *Isabella*, with remainder to her children, and an annuity of 300*l.* to his daughter, *Matilda*, with remainder to her children, and then he gives a like annuity to his daughter, *Mary*, who, it appears, was unmarried at the time; but the description of the two other ladies shows they were married at that time: and what makes it probable that they had children, is that the testator does not, with respect to those married daughters, make any provision in respect of their not having children. But, with respect to *Mary*, the disposition is general: he gives the annuity to *Mary*, and says: "I direct that the principal monies from which the said annuity of 300*l.*, shall accrue or arise, shall be paid and divided amongst all and every the children which she may have by any future husband." Therefore, he provides for all her children. Then he says: "And in case she shall happen to die without issue, then such principal sum to be divided amongst the children of my son, *Charles*, and my daughters, *Isabella* and *Matilda*, in equal parts and shares, on their attaining their ages of twenty-one years." Therefore, it is perfectly plain that, with respect to the fund out of which *Mary's* annuity was to arise, he uses

1848.

HAWKINS v. HAMERTON.

the word, "issue," (as I conceive he did in the clause which relates to the leaseholds,) as meaning the children of the party of whom he speaks. Then there is the direction which applies to the residuary estate. He directs that, "the dividends and interest shall be paid and divided amongst all my children, the said *Charles Hamerton*, and my said three daughters *Isabella*, *Matilda* and *Mary*, or such of them as shall be living at the time of the death of my said wife, in equal parts, shares and proportions during their natural lives. And it seems to me to be quite plain, from those words, that no one of the four children could take any interest for life, unless one of the four children survived the wife. Indeed it must be so from the nature of the bequest: because it is a bequest for life with remainder after the life. Now observe what sort of language the testator uses after directing that his son and daughters are to take the residue in equal parts, shares and proportions, during their natural lives. He says: "And from and after the decease of my said son and daughters, then I will and direct that the whole of such residue and remainder of my estates, with all accumulations thereof, shall be paid and divided amongst all and every the children of my said son and daughters, in equal parts, shares and proportions." Now the words, of themselves, do not describe such and only such of the sons and daughters, as might happen to be living at the death of the wife: but the direction is in general terms. "After the decease of my said son and daughters (that is of the son and all the three daughters) the whole of such residue shall be paid and divided amongst all and every the children of my said son and daughters." And I cannot but think that the words, themselves, do naturally import that the children of *Isabella*, though

she might not happen to be alive at the death of the widow, should take such share as *Isabella* herself would have taken if she had survived the widow.

Mr. *Bethell.* How can a child of a child dying in the lifetime of the widow, have a share?

The VICE-CHANCELLOR:

My opinion is that what the testator meant, was that, as soon as the fund became clear by the death of the children who should survive the widow, there should be a division, retrospectively, to those children which each of them might happen to have or to have had. And, if that is the true construction, the consequence is that the children which *Isabella* had, are entitled to such share as *Isabella* herself would have taken in case she had survived the widow. I therefore hold that, in the event which has actually happened, the children of *Isabella* are entitled to one fourth.

That construction is corroborated by the passage, in the preceding part of the will, in which the testator directs that, in the event of his son dying without leaving children, the leasehold shall be considered as part of his residuary estate, and be divided amongst the children of his three daughters. Therefore, taking the whole of the will together, I think that there is quite enough to show that the children of *Isabella* are entitled to such share as *Isabella* herself would have had, provided she had survived the widow.

Then with respect to the share of *Charles.* As he has died without leaving issue, the right to his share must depend upon that clause in the will in which the testator says: "And, in case any of my said son and

1848.

HAWKINS v. HAMERTON.

daughters shall happen to die without leaving issue, then I will and direct that the legacy, part or share hereby given and bequeathed to him, her or them so dying without issue, shall go and be divided amongst the survivor or survivors of my said children and their issue, in the like equal parts, shares, and proportions." Now it seems to me to be quite plain that the testator, by the words, "survivor or survivors of my said children," did not mean such of his children as should survive his widow; and I also think that, when he used those words, the order in which his children might die, successively, was not present to his mind. But, taking that clause in connection with the gift over of the leasehold to which I have before referred, my opinion is that though he has used the words, "survivor or survivors," he meant, "other or others;" and, as he has added the words, "in the like equal parts, shares and proportions," I think that he meant the issue of deceased parents, to take *per stirpes*.

The result is that the children of *Isabella* are entitled to one fourth of the residue; and the children of *Mary*, to another fourth; and that *Matilda* is entitled to another fourth, for her life, with remainder to her children: and, with respect to *Charles's* fourth, one third of it goes to the children of *Isabella*; another third to the children of *Mary*; and the remaining third, to *Matilda*, for life, with remainder to her children.

Spooner's Trust. 2 Sim. N.S. 131.
Norris's Trust. 1 Johnson 207.
Lakin v. Lakin 34 Beav. 446
Thompson v. Davy 11 Ch. D. 957

CARTER *v.* TAGGART.

1848.
22nd November.

Appointment.
Residue.
Will.
Construction.

Testatrix having power under her late husband's will, to dispose of 10,000*l.* Consols, recited the power, and then proceeded thus: "Now I do give and bequeath the said 10,000*l.* Consols in manner following; that is to say I give, to *G. A.* the sum of 500*l.* sterling: I give, to my executors, the sum of 600*l.* Consols in trust to pay the dividends to *S. T.* during her life, and after her decease, the said 600*l.* to sink into the residue of my estate: I give and bequeath, to *H. B.*, his executors, &c., all *the rest and residue of the said* 10,000*l. Consols, after deducting therefrom the legacies above-mentioned.*

G. A. died in the testatrix's lifetime.

Held that the 500*l.* given to him was not to be deducted from the 10,000*l.* Consols.

THE testator in this Cause, by one of the codicils to his will, expressed himself as follows:

"Whereas it is my most anxious wish and desire to provide, most amply, for my dear wife, whose kindness and attention to me have been most affectionate and unremitting; and, although I have endeavoured to provide for her by my said will and have added to such provision by several codicils thereto, yet I do not think I can more than compensate or reward her for her long and faithful services and attention to me: and, as I fear and, indeed, have reason to suppose that, as I married late in life, some of my relations and others do not look upon or respect her in the manner I consider and know she is deserving; and, as I entertain some fears that they may not, after my decease, pay that proper attention to her that they ought and of which I know she is fully deserving, I do intend, by this codicil to my said will, to put it into her power to reward those who shall treat her with proper respect and attention: I do, therefore, hereby, fully authorize and empower her, my said dear wife, to give and bequeath, by her last will and testament or any codicil or codicils thereto or any writing purporting to be a codicil to her will, the sum of 10,000*l.* £3 per Cent. Consolidated Bank Annuities, *to any person or persons*

1848.

CARTER v. TAGGART.

whomsoever and in any proportions or manner she may think proper; which said sum of 10,000*l.* Consolidated Bank Annuities shall be taken from the 20,000*l.* like annuities, the dividends of which last-mentioned sum of 20,000*l.* Consolidated Bank Annuities, I have, amongst other things, given to her, for life, by my said will; but which sum of 10,000*l.* Consolidated Bank Annuities, or any part thereof, shall not be payable to any legatee or legatees under her said will, until after the death of her brother, *Henry Baskcomb*, to whom I have, amongst other things, given by my said will, after the decease of my said wife, the dividends of the said 20,000*l.* £3 per Cent. Consolidated Bank Annuities, for his life; and, in case my said wife shall not so dispose of the said 10,000*l.* Consolidated Bank Annuities or any part thereof, by her will as aforesaid, then I order and direct that such part thereof as she shall not so dispose of, shall continue part of the said 20,000*l.* £3 per Cent. Consolidated Bank Annuities and go in manner directed by my said will."

The testator died in August 1834.

His widow made her will, dated the 23rd of September 1834, in the following words:

"This is the last will and testament of me, *Ann Taggart*, of *Chislehurst* in the county of *Kent*, widow. First, I direct all my just debts, funeral and testamentary expenses to be paid by my executors hereinafter named. Whereas my late dear husband, by a codicil to his will, gave me power, by my will, to dispose of the sum of 10,000*l.* £3 per Cent. Consolidated Bank Annuities, in any manner and to any persons I might think proper: Now, therefore, I do, by this my will, give and bequeath the said 10,000*l.* Consolidated Bank Annuities in manner

following; that is to say, I give to my godson and goddaughter, *George Baskcomb* and *Ann Baskcomb*, the children of my brother *Henry Baskcomb*, the sum of 100*l.* sterling to each of them my said godson and goddaughter: I give to my goddaughter *Ann Middleton*, the daughter of *James Middleton* of *Chislehurst* aforesaid clerk, and to *Susannah Pike*, my goddaughter, the daughter of *William* and *Elizabeth Susannah Pike* now *Elizabeth Susannah Harris*, to each of them my said last-mentioned goddaughters, the sum of 100*l.* sterling: *I give to* George Adney, *the nephew of my late dear husband, the sum of* 500*l. sterling:* I give, to my executors hereinafter named, the sum of 600*l.* £3 per Cent. Consolidated Bank Annuities, upon trust to pay the dividends thereof to *Sarah Toon*, widow, during her life; and I wish the same to be paid to her in weekly payments, so that she may be enabled to live and not make away with the same improperly; *and, after her decease, the said* 600*l. to sink into the residue of my estate:* I give to each of them, *Maria Middleton*, the wife of the said *James Middleton* and the said *Elizabeth Susannah Harris*, the sum of 50*l.* sterling: and I give the said 50*l.* to each of them independent of their husbands, and their respective receipts alone shall be sufficient discharges to my executors: I give, to *Thomas Toon*, now working in this my dwelling-house as a painter, the sum of 20*l.* sterling: I give to my cousins, the *Smith* family, consisting of seven persons, namely, *Elizabeth Smith, Sarah Smith, Thomas Smith, Charlotte Joseph*, late *Smith* spinster, *Hannah Brown*, late *Smith* spinster, *Jemima Blundell* and *Sophia Smith*, each, the sum of 10*l.* sterling: and I give and bequeath, unto my dear brother, *Henry Baskcomb*, his executors, administrators and assigns for ever, *all the rest and residue of the said* 10,000*l.* £3 *per Cent. Consolidated Bank Annuities,*

1848.

CARTER v. TAGGART.

after deducting therefrom the different legacies above mentioned: and I also give, to my said brother, all my own personal estate and effects whatsoever and wheresoever, trusting that he will, thereout, amply provide for my nephew and niece, his children, and fulfil any other request that I may make to him: and I do hereby nominate and appoint my said brother, *Henry Baskcomb*, and his son, *George Henry Baskcomb*, executors of this my last will and testament."

George Adney died in the lifetime of the testatrix.

By an exception taken, by the Plaintiffs, to the *Master's* report made in obedience to the decree in the Cause, two questions were raised: one was whether the testator's relations were the only objects of the power over the 10,000*l.* Consols which he had given to his wife: the other was whether, in the event that had happened, *Henry Baskcomb* was entitled, as the appointee of the residue of the 10,000*l.* Consols, to the 500*l.* which the testatrix had given to *George Adney*.

Mr. *James Parker* and Mr. *Elderton*, who appeared in support of the exception, admitted that the first question was not arguable. With respect to the second, they said that a gift of the residue of a specific fund, differed, in its effect, from the gift of the rest and residue of a testator's personal estate; for it did not entitle the party in whose favour it was made, to more of the fund than would remain after the sums previously given, were deducted from it; or, in other words, that it was nothing more than a gift of an aliquot, or specific part of the fund; and, consequently that the 500*l.* did not devolve to *Henry Baskcomb*, but formed part of the 20,000*l.* Consols, and was subject to the directions contained in

the testator's will, respecting that fund. They cited *Hunt* v. *Berkley* (*a*) and *Page* v. *Leapingwell* (*b*), which they relied on as being precisely in point.

Mr. *Bethell* and Mr. *W. T. S. Daniel*, in support of the report.

The testatrix had an absolute power over the 10,000*l.* Consols: and she commences her will by declaring it to be her intention to dispose of *the whole* of that fund. After reciting the power, she says: "Now, therefore, I do, by this my will, give and bequeath the said 10,000*l.* Consolidated Bank Annuities:" that is to say: "the whole of the said 10,000*l.* Consolidated Bank Annuities in manner following." She next makes certain charges on the fund in favour of different individuals, and then she gives the residue of the fund to *Henry Baskcomb*. The "residue" means the whole fund after deducting the charges; and, if no individual can claim to have those deductions made, the residuary legatee is entitled to the whole fund. The case of *Falkner* v. *Butler* (*c*) is conclusive on the point.

Mr. *James Parker*, in reply, said that *Falkner* v. *Butler* was decided on the particular wording of the will.

The VICE-CHANCELLOR:

It seems to me that the testatrix has manifested an

(*a*) Moseley, 48. On this case being cited, the *Vice-Chancellor* remarked that Lord *Eldon* did not approve of Moseley's reports; but see 1 Mer. 92, and 2 Swanst. 195, n., from which it appears that Lord *Eldon* entertained a favourable opinion of those reports. However, in 3 Anst. 861, Mr. Baron *Thompson* is reported to have said: "As to the case in Moseley, the authority of that book is very small."

(*b*) 18 Ves. 463.

(*c*) Amb. 514.

1848.

CARTER v. TAGGART.

intention to give to *Henry Baskcomb*, not the residue of the 10,000*l.* Consols after the sums which she has given to the other persons named in her will should have been deducted from it; but the 10,000*l.* Consols charged with those sums.

She, first of all, shows that she intends to dispose of the whole of that fund. She then gives certain sums to different individuals; and, with respect to one of those sums, I mean the 600*l.* Consols which she gives to *Sarah Toon* for life, she directs that, after the decease of *Sarah Toon*, it shall sink into *the residue of her estate;* by which she plainly means the 10,000*l.* Consols out of which the 600*l.* were given. And, taking the whole of the will together, my opinion is that the 500*l.* sterling given to *George Adney*, was a charge upon the 10,000*l.* Consols; and that what the testatrix meant by the words: "all the rest and residue of the said 10,000*l.* Consols after deducting therefrom the different legacies above mentioned," was that the legacies should be deducted if there were any persons capable of claiming them; but not otherwise.

In *Falkner* v. *Butler*, it was held that the sum which was not properly appointed, was not to be deducted at all.

Exception overruled.

MASON *v.* BEST.

1848:
23rd November.

New Orders. Service of Office Copy. Practice.

Service of an office copy of the bill, held to be good, notwithstanding the interrogating part was not omitted in the office copy.

MR. *Archibald Smith* stated to the Court that the *Registrar* felt some difficulty about drawing up an order, which he had obtained, for leave to enter a memorandum of the service of an office copy of the bill on two of the Defendants, because the interrogating part of the bill, was not omitted in the office copy.

The *Vice-Chancellor* said that the Plaintiff had only done more than he was required to do, and directed the order to be drawn up.*

* See 23 & 24 Orders of August 1841; Beav. Ord. 171; and *Gibson* v. *Haines*, 1 Hare, 317.

M'MAHON *v.* RAWLINGS.*

1848:
24th November.

Colonial Representation. Executors and Administrators. Personal Representative.

Colonial letters of administration will entitle the administrator to sue in this country, in respect of a sum of stock standing in the names of trustees, to a share of which the intestate was entitled.

THIS was a suit to carry into execution the trusts of a marriage settlement dated the 14th of November 1804, under which a sum of 12,000*l.*, to be raised out of an estate in one of the *West India Islands*, was settled on the children of *W. W. Rawlings*.

There were ten children; one of whom, *Stedman Rawlings*, died intestate in the *West Indies*, and his brother, *David*, obtained letters of administration to his effects,

* *Ex relatione.*

1848.

M'MAHON v. RAWLINGS.

from the Colonial Court, and, in his own right and as the administrator of his deceased brother, instituted the suit against the trustees of the settlement and his surviving brothers and sisters.

No part of the 12,000*l.* had been raised at the death of *Stedman Rawlings*; but, afterwards, a sum of money was awarded as a compensation for the emancipation of the slaves on the estate, and was invested in Consols in the names of the trustees of the settlement, and was the only fund that was subjected to the trusts of the settlement.

At the hearing of the Cause, it was objected that letters of administration to the estate of *Stedman Rawlings*, ought to be obtained from the Ecclesiastical Court in *England:* and *Whyte* v. *Rose* (*a*) was cited in support of the objection.

Mr. *Bethell*, Mr. *James Parker*, Mr. *Bagshawe*, Mr. *Shapter* and Mr. *Bagshawe* jun., appeared for the different parties.

The *Vice-Chancellor* held that the colonial administration was sufficient.

(*a*) 3 Queen's Bench Rep. 493.

THE DUKE OF LEEDS *v.* LORD AMHERST.

1848: 25th November.

Practice. Witness. Re-examination.

Leave given, under the circumstances of the case, to examine a witness, before the *Master*, after the decree, as to a matter with regard to which he had been examined before the decree.

THE bill sought relief in respect of certain acts of equitable waste, which, it alleged, commenced in 1809;* and one *Mawe*, a witness examined for the Plaintiff before the hearing, deposed that those acts commenced in or about 1809. The decree declared that the personal estate of the late Duke of *Leeds*, (who had committed the waste,) was liable to account, to the Plaintiff, for all the benefits and profits received by the late Duke, from or by means of the acts of waste complained of by the bill and committed by him on the estate in question; and directed the *Master* to take an account of all the sums received, by the late Duke, by the sale of the materials of the house and other buildings which he had pulled down; and to inquire and state what ornamental timber, and saplings and young trees not fit to be cut, had been felled by the late Duke, and of the sums which he had received from the sale thereof.

After some proceedings had taken place, in the *Master's* office, under the decree,

Mr. *Bethell* and Mr. *Lloyd* moved that the Plaintiff might be at liberty to examine *Mawe* before the *Master*, in order to show that part of the house was pulled down in 1801, and that some of the timber was felled prior to 1809.

Mr. *James Parker* and Mr. *G. L. Russell*, for the

* See *ante*, Vol. XIV., page 357.

1848.

THE DUKE OF LEEDS v. LORD AMHERST.

Defendants, said that the object of the motion was, not only to examine a witness before the *Master* as to a matter with regard to which he had been examined before the decree, but also to enable him to contradict the evidence which he had given on that examination: that the interrogatories on which he had been examined, were general as to the time at which the pulling down of the house and the felling of the timber commenced; and that he had deposed that those acts commenced in 1809; but the Plaintiff was now trying to make him stretch his memory beyond 1809 and give evidence which was quite different from that which he had given before: *Rowley* v. *Adams* (*a*).

The *Vice-Chancellor*, after observing that *Mawe* had deposed that the pulling down of the house began *in or about* 1809 and not in 1809, and that he did not understand what 'in or about,' meant, said that, though the acts complained of, were limited, by the bill, to a particular time, yet the inquiry directed by the decree, was not so limited but was general, and, therefore, he should grant the motion.

(*a*) 1 Myl. & Keen, 543.

RUBERY *v.* MORRIS.*

1849: 15th November.

Costs. Pauper. Practice.

If a Plaintiff dismisses his bill, the Defendant, though a *pauper*, is entitled to *dives* costs.

IN Michaelmas Term 1849, the *Lord Chancellor* gave judgment in this case, and held, overruling the certificate of the *Taxing-Masters*, that the Defendant was entitled to *dives* costs.

His Lordship, in the course of his judgment, said that the report of this case, which is given *ante*, page 312, stated, erroneously, that, when the case was before him in July 1848, he decided that the Defendant was entitled to *pauper* costs only. The Reporter, however, begs to observe that not only does that report *not* state that his Lordship pronounced any order, but a note appended to it states that, according to information which the Reporter had obtained from the Counsel in the case and the Plaintiff's solicitor, his Lordship did *not* pronounce any order.

* See *ante*, page 312.

STEWART *v.* FORBES.

1848: 11th December.

Decree. Jurisdiction. Petition.

Petition to rectify what was alleged to be an error or mistake in a decree, dismissed.

THE parties to this suit having consented that the *Vice-Chancellor*, instead of directing an issue, should, himself, decide the matter of fact which, but for that consent, would have formed the subject of the issue, the decree was drawn up in the following terms: "The Plaintiff and the Defendant having, by their Counsel, consented that this Cause should be decided by the

1848.

STEWART v. FORBES.

Court without directing an issue; this Court doth order that the Plaintiff's bill be dismissed with costs."

On a petition of appeal from that decree being brought on for hearing before the *Lord Chancellor*, his Lordship considered that, as the parties had consented that the case should be decided by the Court without directing an issue, they had precluded him from taking what might be the only means by which their rights could be properly determined; and, therefore, he refused to hear the appeal. His Lordship, however, allowed the petition to stand over, in order to give the Plaintiff an opportunity of applying to the *Vice-Chancellor* to vary the decree (*a*).

Accordingly the Plaintiff presented a petition praying that the *error or mistake in the decree*, might be corrected by striking out the words: "The parties having consented that the matters in question in this Cause should be decided by the Court without directing an issue;" and by substituting, for them, the words: "The parties not asking for an issue;" or that the decree might be corrected in such other way as should express or be in accordance with the true intent and meaning of the parties touching the hearing of the Cause before the *Vice-Chancellor*, and what really took place in reference thereto.

Mr. *James Parker*, and Mr. *Archibald Smith* appeared for the Plaintiff, and

Mr. *Bethell*, and Mr. *Lewis* for the Defendant. But

The VICE-CHANCELLOR without hearing them, said: This petition is, altogether, wrong. If there had been

(*a*) See 1 Macnaghten & Gordon, 137.

1848.

STEWART v. FORBES.

a clerical error in the decree, I should have corrected it at once. But this is, in effect, an attempt, by mere petition, to alter the whole of the decree: for there really was no mistake. The decree was written and delivered, by me, to the *Registrar*, after having been read out, by me, to the Counsel present in Court. At the time when the decree was pronounced, no objection was taken, nor did any objection occur to Counsel, till long afterwards; nor, as I understand, would any objection have occurred to them at all, unless my *Lord Chancellor* had expressed an opinion, when a petition of rehearing was brought before him, that a certain consequence flowed from the decree. Moreover, not only did the parties consent, but they actually requested that I should do that which, in fact, I did. My opinion is that I am not at liberty to alter this decree; first, because, I am not at liberty to alter a decree on petition, unless there is a clerical error in it; and secondly, because, if I were to alter it in the manner in which I am asked to alter it, I should be giving it a different form and a different effect from what I intended it to have.

So let the petition be dismissed with costs.

On the 15th of January 1849, the *Lord Chancellor* affirmed his Honour's order. His Lordship, however, allowed the appeal from the decree to be proceeded with, on the understanding that it must be dismissed if the case should appear to be one in which an issue ought to be directed.

1848: 20th and 21st December.

Chose in action. Husband and wife. Reduction into possession. Settlement.

A female infant being entitled, under a will, to 1000*l.* and to the reversion of 2000*l.* expectant on her father's death, covenanted with the trustees of her marriage-articles, to do all necessary acts, when she should attain twenty-one, for vesting those sums in the trustees, upon the trusts of the articles. Shortly before the infant attained twenty-one, the executors of the will, without any direction from her or her husband, transferred a sum of stock in which the 1000*l.* had been invested, to the trustees of the articles. Afterwards the husband died leaving his wife and her father surviving.

Held that the transfer to the trustees, was a reduction into possession, and, therefore, that the 1000*l.* was bound by the articles; but that the wife was entitled, by survivorship, to the 2000*l.*, subject to her father's life-interest.

ANNE CUNINGHAM, WIDOW, *v.* ANTROBUS.

IN February 1832 the Plaintiff, whose maiden name was *Hervey*, and who was then in her seventeenth year, married *William Cuningham*, Esq. By articles of agreement made in contemplation of their marriage, after reciting the will of Lady *Anne Barnard* and a codicil thereto, under which the Plaintiff was entitled to 1000*l.* and to the reversion of 2000*l.* expectant on the decease of *Andrew Hervey*, her father; and that, upon the treaty for the marriage, it was agreed that such settlement should be made as therein and hereinafter mentioned, of the 1000*l.*, and of the reversion of the 2000*l.*, and of all other sum and sums of money, property and effects, which the Plaintiff should, thereafter, acquire by descent, gift, devise, bequest or otherwise howsoever: the Plaintiff declared and agreed that, so soon as she should attain twenty-one, and so, from time to time, as she should be entitled, by law, to act therein, she would do, consent to, join in and execute, and *William Cuningham*, for himself, his heirs, executors and adminstrators, covenanted with the Defendants, Sir *Edmund Antrobus*, *James Lindsay*, *Charles Cuningham* and *James Aitken*, that he would do and execute, and join with the Plaintiff in doing and executing all such deeds, acts, assurances, matters and things as should be requisite for

Pringle v Pringle 22 Beav. 555.
Hamilton v Mills 29 Beav. 195.
Logan - Duffield 20 Eq. 868

transferring, vesting in, and assigning and assuring the 1000*l.* and the Plaintiff's reversionary interest expectant on the decease of her father, in the 2000*l.*, and all other sum and sums of money, property and effects which the Plaintiff should thereafter acquire by descent, gift, bequest or otherwise howsoever, to Sir *Edmund Antrobus*, *James Lindsay*,* *Charles Cuningham* and *James Aitken*, in trust for *William Cuningham*, and the Plaintiff, for their lives, successively; and, after the decease of the survivor of them, in trust for their sons who should attain twenty-one, and for their daughters who should attain that age or marry; and, in case there should be no such son or daughter, in trust for such persons as the Plaintiff should, by deed or will, appoint; and, in default of such appointment, in trust for her next-of-kin.

There was issue of the marriage three children.

William Cuningham died on the 29th of October 1837.

The bill was filed in July 1847; at which time the Plaintiff's father was living; but two of the children of the marriage were dead. After stating as above, it alleged that neither the Plaintiff nor her late husband, ever gave any directions for the transfer, into the names of the trustees named in the articles, of the sum of 1141*l.* 4*s.* 6*d.* £3 per Cent. Reduced Annuities in which the 1000*l.* had been invested; but that, nevertheless, sometime after the execution of the articles, the 1141*l.* 4*s.* 6*d.* stock was transferred into the names of the trustees; and that they claimed to retain the same upon the trusts declared by the articles, and also insisted that they were entitled, on the death of the Plaintiff's father, to have transferred

* Sir *E. Antrobus* and *James Lindsay* were two of Lady *Anne Barnard's* executors.

1848.

CUNINGHAM v. ANTROBUS.

to them, upon the same trusts, the 2203*l.* 17*s.* 1*d.* like Annuities in which the 2000*l.* had been invested, and that they were also entitled to have transferred to them, upon the same trusts, all other sum and sums of money, property and effects which the Plaintiff might acquire by descent, gift, devise, bequest or otherwise howsoever. But the Plaintiff was advised that, the articles having been executed by her during her minority, she was not bound thereby: that she had not, since the death of her husband, done any act to confirm the articles, and she was desirous to have them delivered up to be cancelled, and to have the 1141*l.* 4*s.* 6*d.* stock transferred to her. But it was contended, on the part of the Defendant, *William Cuningham*, the Plaintiff's only surviving child by her late husband, that the Articles were valid and binding upon the Plaintiff, and that full effect ought to be given to the same. The bill charged that the articles were never acted upon by the Plaintiff's late husband, and that he never received any monies by virtue thereof: and it prayed that they might be declared to be inoperative and void as against the Plaintiff, and might be decreed to be delivered up to her to be cancelled, and that the Defendants, the trustees, might be decreed to transfer, to the Plaintiff, the 1141*l.* 4*s.* 6*d.* stock, and to pay to her the dividends, which, prior to such transfer, should accrue due thereon.

The trustees, in their answer, said they believed that neither the Plaintiff nor her late husband ever, personally, gave any direction for the transfer of the 1141*l.* 4*s.* 6*d.* stock into the names of the trustees; but that, on or about the 20th of August 1836, that sum was transferred into their names, by the authority of Lady *Anne Barnard's* executors; and that such authority was contained in the following letter to Messrs. *Coutts and Co.*:

1848.

CUNINGHAM v. ANTROBUS.

"Messrs. *Coutts and Co.* we desire you will transfer 1141*l.* 4*s.* 6*d.* Reduced £3 per Cents., from our joint names, into the names of Sir *Edmund Antrobus*, Bart., Lieutenant Colonel *James Lindsay*, *Charles Cuningham*, Esq., and *James Aitken*, Esq., being part of 3649*l.* 12*s.* 5*d.* the dividends of which you have placed to the credit of Mrs. *Anne Cuningham*." The Defendants further said that they claimed to retain the 1141*l.* 4*s.* 6*d.* stock upon the trusts declared by the articles; and they submitted whether they would not be entitled, on the death of the Plaintiff's father, to have the 2203*l.* 17*s.* 1*d.* stock transferred to them upon the same trusts, and whether they were not entitled also to have all the sums of money which the Plaintiff might acquire by descent, gift, bequest, or otherwise howsoever, transferred to them upon the same trusts; that they were advised and insisted that the articles had been acted upon both by the Plaintiff since she became a widow, and by her husband, in manner therein mentioned: that they believed that her husband never received any monies by virtue of the articles: that the Plaintiff, since the death of her husband, *had confirmed the articles by the execution of the release thereinafter mentioned*: that they were advised that, under the articles, the husband covenanted to transfer to the Defendants, all the property, including therein the sums specifically mentioned in the bill, which he might acquire in right of the Plaintiff, upon the trusts contained in the articles; and that the 1141*l.* 4*s.* 6*d.* stock to which he so became entitled, was transferred into their names upon those trusts, and thereby, as they were advised, the said sum became duly invested in their names, and was then held by them upon those trusts: that, on the 6th July 1839, a deed poll was executed by the Plaintiff, which, after reciting the will and codicil of Lady *Anne Barnard*, and the Plain-

1848.

CUNINGHAM v. ANTROBUS.

tiff's marriage with her late husband, proceeded thus: "And whereas, previous to such marriage, by certain articles of marriage settlement bearing date on or about the 6th day of February 1832, and made between the said *William Cuningham* of the first part, the said *Anne Hervey*, spinster, of the second part, the said Sir *Edmund Antrobus*, *James Lindsay*, *Charles Cuningham* and *James Aitken* of the third part, it was witnessed, declared, agreed, stipulated and covenanted that the reversionary interest of the said *Anne Hervey*, expectant on the decease of her father Captain *Andrew Hervey*, of and in the first hereinbefore-mentioned sum of 2000*l.*, and also the said sum of 1000*l.*, and also all other sum and sums of money, property and effects to which the said *Anne Hervey* then was or should thereafter become entitled, or which she should acquire by descent, gift, bequest or otherwise howsoever, should be transferred to and vested in the said Sir *Edmund Antrobus*, *James Lindsay*, *Charles Cuningham* and *James Aitken*, *upon the trusts therein mentioned, under and by virtue whereof the said* Anne Cuningham, *then* Anne Hervey, *is now entitled to the interest, dividends and yearly income to arise and be made therefrom*: and whereas *the said settled sum of* 1000*l.*, and the stocks, funds and securities whereon the same was invested, have been transferred into the names of the said Sir *Edmund Antrobus*, *James Lindsay*, *Charles Cuningham* and *James Aitken*, as she, the said *Anne Cuningham*, doth admit and acknowledge by her executing these presents: and whereas all the accounts relating to the fortune and legacies given to and provided for the said *Anne Cuningham* by the said will and codicil of the said Lady *Anne Barnard*, and the income derived therefrom, as well up to the time of her marriage as up to the day of the date of these presents, have been made up, and the same have been inspected, settled and

approved by the said *Anne Cuningham*, and the balance thereof paid over to her, as she doth hereby also acknowledge, testified by her sealing and delivering these presents: Now these presents witness that, in consideration of the premises, she, the said *Anne Cuningham*, hath acquitted, released and discharged, and, by these presents, doth acquit, release and discharge the said Earl of *Balcarres*, *Hugh Lindsay*, *James Lindsay* and Sir *Edmund Antrobus*, the executors and trustees of the said will of the said Lady *Anne Barnard* and of the codicil thereto, and the estate, effects and property of the said Lady *Anne Barnard*, of and from all claims and demands whatsoever for and in respect of the fortune and legacies, by the codicil to the will of the said Lady *Anne Barnard*, in any way, given to or provided for her, the said *Anne Cuningham*, and the income which has arisen from the same, and of the application thereof, and all actions, suits, accounts and reckonings in respect thereof up to the time of the sealing and delivering of these presents: Provided always and it is hereby declared that the release hereby made and given, is not to release and discharge the said executors or trustees of the will and codicil of the said Lady *Anne Barnard*, of *and from the payment of the hereinbefore recited or mentioned legacy of* 2000*l.*, *or from the payment of any further or reversionary property to which the said* Anne Cuningham *may become entitled by the happening of subsequent events under and by virtue of the said will and codicil of the said Lady* Anne Barnard."

It appeared from the *Master's* report made in pursuance of an order in the Cause, that the Plaintiff attained twenty-one on the 2nd of September 1836.

Mr. *James Parker*, and Mr. *Elderton*, for the Plain-

1848.

CUNINGHAM v. ANTROBUS.

tiff, said that it was clear that the 2203*l.* 17*s.* 1*d.* stock, being a reversionary chose in action, had survived to the Plaintiff, free from the provisions of the Articles; and that the only question was as to the 1141*l.* 4*s.* 6*d.* stock, which had been transferred to the trustees of the Articles: that that transfer was made without the direction of the Plaintiff or her husband, and before the Plaintiff attained twenty-one.

The VICE-CHANCELLOR:

The transfer was made under the authority of a letter written, by Lady *Anne Barnard's* executors, to *Coutts and Co.*; and the question is whether the act of the executors, was not a reduction into possession by the husband of the Plaintiff.

Argument resumed.—Nothing but an act done by the husband, could reduce the fund into possession. According to the covenant in the articles, nothing was to be done to disturb the fund, until the wife should attain twenty-one. The executors, however, took upon themselves to transfer the fund, or to direct it to be transferred, before she attained twenty-one. *That* cannot deprive the wife of her right by survivorship. *Ellison* v. *Elwin* (*a*), *Le Vasseur* v. *Scratton* (*b*).

The VICE-CHANCELLOR:

It strikes me that there has been a reduction into possession in this way: Sir *Edmund Antrobus* and Mr. *Lindsay* were two of the executors of Lady *Anne Barnard's* will; and they were two of the trustees of the articles: and, shortly before the Plaintiff attained twenty-

(*a*) *Ante*, Vol. XIII. page 309.

(*b*) *Ante*, Vol. XIV. page 116.

one, an authority was given by Sir *Edmund Antrobus* and Mr. *Lindsay*, and their co-executors, in the nature of a power of attorney, by means of which the fund was transferred from the names of the executors into the names of the trustees, and there it was allowed to remain; and it appears to me that that was equivalent to a reduction into possession.

Mr. *James Parker* and Mr. *Elderton* then said that the next question was as to the effect of the release executed by the Plaintiff in 1839—whether it was a confirmation of the articles as to the 2203*l.* 17*s.* 1*d.* to which the Plaintiff was entitled in reversion. They relied on the saving at the end of the release, as showing that the Plaintiff did not intend to give up the right which she had, at the date of the release, to the sum in question.

Mr. *Welford* for the Defendant *William Cuningham*, said that the release was executed by the Plaintiff, after she had become discovert, and that she thereby confirmed the articles.

Mr. *Bethell* and Mr. *Elmsley* appeared for the trustees of the articles. On Mr. *Bethell* rising to address the Court, Mr. *James Parker* objected to his being heard, as Mr. *Welford* appeared for the *cestui que trust*.

Mr. *Bethell* replied that Mr. *Welford* was instructed by the Plaintiff's solicitor.

The *Vice-Chancellor* said that, as that was the case, he should hear the Counsel for the trustees.

Mr. *Bethell* then said that the release did not *recite*

1848.

CUNINGHAM v. ANTROBUS.

the articles, but stated the effect of them and treated them as operative and binding on the Plaintiff; that, in the operative part, the Plaintiff spoke of the legacy of 1000*l.* as: "the said *settled* sum of 1000*l.*," and released the executors and trustees of the testatrix's will, from the legacies and from all actions, suits, claims and demands in respect thereof; and, consequently, the Plaintiff's personal right as legatee of the funds, was released: that the effect of the proviso was not to save that right, but only to preserve the right of the trustees of the articles, to demand *payment* of the legacies.

Mr. *James Parker*, in reply, said that, before the Plaintiff executed the release, the 2203*l.* 17*s.* 1*d.* stock had become her property; and that the effect of the release was not to give away anything that was hers absolutely.

The VICE-CHANCELLOR, after taking time to read over the release, said that the utmost that that instrument did, was to leave the 2203*l.* 17*s.* 1*d.* as the Plaintiff found it; but that it seemed to afford an inference that the Plaintiff intended that she herself should have the reversion.

Declare that the Plaintiff's reversionary interest in the 2203*l.* 17*s.* 1*d.* stock, is not bound by the marriage articles, but that the 1141*l.* 4*s.* 6*d.* stock is bound by them.

THORNEYCROFT *v.* CROCKETT.

1848: 21st December.

Mines, Mortgagor. Mortgagee.

A mortgagee in possession, who had opened and worked mines on the mortgaged estate, charged with his receipts but disallowed his expenses.

THE bill was filed by a mortgagee, who had entered into possession of the mortgaged estate, to foreclose the mortgage. The decree directed the *Master* to take an account of the principal and interest due to the Plaintiff, and of the rents and profits of the estate received by him, or by any person or persons by his order or for his use, or which, without his wilful neglect or default, might have been received; and, in case the *Master* should find that the Plaintiff had been in the occupation of the mortgaged premises, or any part thereof, that he should set a value, by way of annual rent, thereon, and that the Plaintiff should be charged with such value, on taking the account of such rents and profits; and that the *Master* should inquire and state whether the Plaintiff had expended any and what sums of money in necessary repairs and lasting improvements on the mortgaged premises, and that what the *Master* should find to have been so expended by the Plaintiff, should be deducted from what should be coming from him on account of the rents and profits and occupation-rent; and, in case the *Master* should find that the amount of the rents and profits received by the Plaintiff, after such deductions as aforesaid, and the occupation-rent to be charged as aforesaid, exceeded the interest due on the mortgage, it was ordered that he should make annual restitution in taking the said accounts.

The *Master* found that the Plaintiff had opened and worked mines on the mortgaged estate; and, in taking

Dobson v Land 4 Deg. & Sm. 578.
Millett v Davey 31 Beav. 472.

1848:
22nd December.

Will.
Construction.
'Survivor or Survivors.'

Testator, by his will, gave an annuity to *A. B.* and directed his executor to pay it, out of his £3 per Cent. Consols. By a codicil he gave *A. B.* 30*l.* besides her annuity, and willed that the fund constituting her annuity, after her decease, *should be transferred to* Joseph *and* Isaac N. *or to the survivor or survivors of them, in equal shares.*

Isaac survived *Joseph*, but died before *A. B.*

Held that he became entitled to the whole of the fund.

ANTROBUS *v.* HODGSON.

THE bill, which was filed by the personal representative of the testator in the Cause, stated that the testator, by his will dated the 21st of May 1818, gave an annuity of 40*l.* to his servant, *Ann Bagnal*; and directed his executor to pay it, half-yearly, out of his £3 per Cent. Consols; and that he bequeathed all the rest of his property to *Nancy Bancroft*: that, by a codicil dated the 14th of November 1818, the testator directed that the funds constituting the annuity given, by his will, to *Ann Bagnal*, should, after her decease, be transferred to his cousins, *Joseph* and *Isaac Nowell*, or to the survivor or survivors of them, in equal shares: that the testator died shortly after the date of his codicil: that all the persons named in his will and codicil survived him: that his executor set apart 1333*l.* 6*s.* 8*d.* Consols, to answer the annuity of 40*l.*: that *Joseph Nowell* died in 1828, and *Isaac*, in 1832; and that the Defendant *Hodgson* was the personal representative of both of them: that *Ann Bagnal* died in 1844: that conflicting claims to the 1333*l.* 6*s.* 8*d.* Consols, were made, under the will and codicil, by the Defendant *Hodgson*, as the personal representative of *Joseph* and *Isaac Nowell*, and by the Defendant *Nancy Bancroft*, as the residuary legatee under the will.

The bill prayed that the rights and interests of all parties under the will and codicil, in and to the Consols, might be ascertained and declared by the Court.

Nancy Bancroft, in her answer, said that the codicil was partly in the words and figures following: "I give

Littlejohns v Household 21 Beav. 32.
White v Baker 2 D. F. & J. 57.

1848.

ANTROBUS v. HODGSON.

to my servant, *Ann Bagnal*, besides her annuity before-mentioned, the sum of 30*l.* towards purchasing furniture for her house; and I will that the funds constituting her annuity, after her decease, be transferred to my cousins, *Joseph* and *Isaac Nowell*, or to the survivor or survivors of them in equal shares;" and she submitted that, according to the true construction of the codicil, the fund set apart for paying the annuity, was not intended to be a vested interest in *Joseph* and *Isaac Nowell* or the survivor of them, except in the event of both or one of them being alive at the death of *Ann Bagnal*; and that, in consequence of both of them having died in *Ann Bagnal's* lifetime, the gift to them never took effect, and, consequently, the Consols had fallen into and become part of the residue given to her, *Nancy Bancroft*, by the will.

Mr. *Craig* appeared for the Plaintiff.

Mr. *James Parker* and Mr. *Lloyd*, for the Defendant *Hodgson*, said that, under the codicil, *Joseph* and *Isaac Nowell*, took, each of them, a vested interest in a moiety of the 1333*l.* 6*s.* 8*d.* Consols; subject to be divested in one event only, namely, in the event of one of them dying in the lifetime of *Ann Bagnal* and of the other surviving her; in which case the moiety of the one so dying, would have gone over to the survivor; but, as both of them died in the lifetime of *Ann Bagnal*, the vested interests which they took under the codicil, became absolute. *Belk* v. *Slack* (*a*), *Sturgess* v. *Pearson* (*b*), *Wagstaff* v. *Crosby* (*c*), *Templeman* v. *Warrington* (*d*), and *Skey* v. *Barnes* (*e*).

(*a*) 1 Keen, 238.
(*b*) 4 Madd. 411.
(*c*) 2 Coll. 746.
(*d*) *Ante*, Vol. XIII., page 267.
(*e*) 3 Mer. 335.

1848.

ANTROBUS v. HODGSON.

Mr. *Bethell* and Mr. *Lewin*, for the Defendant *Nancy Bancroft*, said, first, that, in the cases cited, there was a direct gift or bequest; but, in the present case, there was only a direction to transfer; that a transfer of stock implied an acceptance of the stock, and, consequently, that one at least of the parties to whom the stock was directed to be transferred, should be living at the time when the transfer was to be made: secondly, that, in the cases cited, the funds were given, by one and the same instrument, to trustees in trust for *A.* for life, and, after *A.*'s death, in trust for other persons; in which cases, the life-interest and the remainder vested together; but, in the present case, there were two distinct gifts, made by two distinct instruments; one of an annuity, made by the will, and the other of a sum of stock, made by the codicil. They referred to 1 Roper on Leg. 506, and cited *Leake* v. *Robinson* (*f*).

The VICE-CHANCELLOR, after reading over the will and codicil, said:

The language of the testator is very inaccurate and obscure. He uses the word 'survivors' with reference to only two persons. But my notion is that the words on which the question has arisen, amount to a gift, of so much of his Consols as produced the annuity, to those two persons and the survivor of them, and, therefore, that the survivor became entitled to the whole.

Declare that *Isaac Nowell* became entitled to the 1333*l.* 6*s.* 8*d.* Consols by surviving *Joseph*, and direct that fund to be transferred to the Defendant *Hodgson*, as his personal representative.*

(*f*) 2 Mer. 363, see page 387.

* The Cause was heard as a short Cause.

Att. Gen. v Bp of Worcester 9 Hare 362.
Manchester School Case 2 L. Reps Ch. 497

THE ATTORNEY-GENERAL *v.* THE EARL OF STAMFORD.*

1848: 4th, 5th, 6th, 7th, and 11th December.
1849: 11th January.

Charity. Grammar-school. Boarders. Trustees.

IN the reign of *Henry VIII. Hugh Oldom*, then Bishop of *Exeter*, and other persons, founded and endowed a free grammar-school at *Manchester*. The school-house and the estates with which the school was endowed, were vested in twelve trustees. A Master and Usher were appointed, and their yearly stipends were to be 10*l.* and 5*l.* respectively. The statutes of the school, directed, amongst other things, that the school should be kept in the cleanest manner, *without any lodging there of any Schoolmaster or Usher*, or any other person: that the school should be made clean, once in a week, by two of

The Statutes of *Manchester* Free Grammar School declared that the Master and Usher (for whom stipends were provided by the foundation-deeds) should teach, freely and indifferently, every scholar coming to the school, without any money or other rewards taken therefore; that no scholar, of what county or shire soever, should be refused; that no scholar should bring meat or drink into, nor should any one lodge in, the school; that vacancies in the trusteeship should be supplied by honest gentlemen and honest persons within the parish of *Manchester*; and that the trustees should have full power to augment, increase, expound and reform the provisions of the Statutes only concerning the schoolmaster, usher and scholars.

The Master and Usher had, for several years, taken boarders, and the boarders had participated in all the benefits of the charity; and the trustees of the school had been, generally, noblemen and gentlemen residing, not in the parish of *Manchester*, but in *Lancashire* and the adjoining counties.

Held that the Master and Usher ought not to be allowed to take any more boarders; and that the trustees thereafter to be appointed, ought to be honest gentlemen and honest persons residing within the parish of *Manchester*, and that persons who occupied and carried on business in manufactories, &c., in the town or parish, and had dwelling-houses within six miles of the school-house, were to be considered as being within the parish, for the purpose of being eligible to be trustees.

* See 1 Phill. 737.

1848.

THE ATT.-GENERAL v. THE EARL OF STAMFORD.

the scholars, and that they should have, therefore, one penny from every scholar on his admission to the school: that every Schoolmaster and Usher, for ever from time to time, should teach, *freely and indifferently*, every scholar coming to the school, *without taking any money or other reward therefore: that no scholar, of what county or shire soever he might be, should be refused*, unless he was afflicted with some contagious infirmity: *that no scholar should bring meat or drink into the school, or take his meals there;* and if any scholar should bring his meat and drink with him, he should go *to some house in the town to eat and drink, and then return to the school:* that, after the death of the surviving Founder, the President of *Corpus Christi* College, *Oxford*, for the time being, and, on his making default for one month after a vacancy, the Warden of *Manchester* College should appoint the Master and Usher: that, whenever the trustees should be reduced to four, those four should make feoffment of the estates to twelve honest gentlemen and honest persons *within the parish of* Manchester, to the like uses: that exhibitions, not exceeding twenty-six shillings and eightpence *per annum* each, should be given to scholars at *Oxford* and *Cambridge* who had been brought up in the school: and lastly, that, inasmuch as, in time to come, many things might survive and grow, by sundry occasions and causes, which, at the making of the statutes, were not possible to come to mind, the trustees, from time to time, when need should require, calling to themselves discreet, learned counsel and men of good literature, should have full power and authority to augment, increase, expound and reform all such of the statutes only concerning the Schoolmaster, Usher, and scholars, for their and every of their offices concerning the school for ever.

1848.

THE ATT.-GENERAL v. THE EARL OF STAMFORD.

In the progress of time, the revenues of the charity became greatly increased; in consequence of which the trustees augmented the salaries of the High-master and Usher; and allowed salaries to two Assistant Masters appointed by the High-master; and granted increased exhibitions to scholars educated at the school, to enable them to prosecute their studies at the Universities of *Oxford* and *Cambridge*.

In May 1833, the trustees presented a petition under Sir *Samuel Romilly's* Act, and obtained an order by which the *Master* of the Court was directed, amongst other things, to inquire into the state and condition of the charity, and what estates and other property were then vested in the trustees, and what was the income thereof; and to settle a scheme for the future establishment and management of the school, having regard to the amount of the annual income of the charity, and to the foundation-deeds and statutes of the school.

In July 1833, the *Master* (Lord *Henley*) reported, amongst other things, that the annual salaries of the High-master and Usher were, respectively, 500*l.* and 250*l.*, in addition to houses of which they had the use, and the rent and taxes of which were paid by the trustees: that the High-master and Usher had, for many years, received boarders into their houses: that the High-master then had fourteen boarders, and the Usher ten: that one of the Assistant Masters received, from the trustees, a yearly salary of 170*l.*, and the other, a yearly salary of 135*l.*; and had been permitted to receive boarders into their houses; and that one of them then had three boarders, and the other twelve: that there were twelve exhibitions of 60*l.* a year each: that the school-house consisted of two rooms, one called the upper, and the other

1848.

THE ATT.-GENERAL v. THE EARL OF STAMFORD.

the lower school: that the number of scholars, including boarders, was one hundred and ninety-eight: that the Earl of *Stamford*, the Earl of *Wilton*, Sir *R. H. Leigh* and certain other gentlemen were the then trustees of the estates and funds of the Charity; and that there was a surplus income of those estates and funds, amounting to 2707*l.*, after paying all outgoings.

The scheme settled by Lord *Henley* in pursuance of the Order, was partly as follows: that the High-master and Usher should receive annual salaries of 600*l.* and 300*l.* respectively, and be provided with houses, the rents and taxes of which should be paid by the trustees, and also be allowed to take twenty and fifteen boarders respectively: that one of the Assistant Masters should be allowed an annual salary of 200*l.*, and to take twelve boarders; and that the other should be allowed an annual salary of 150*l.*, and to take ten boarders: that the High-master's house, which was old and dilapidated, and certain buildings contiguous thereto, which were in the same state, should be taken down, and that a new house for the High-master, with convenient offices, and a new school-room, should be erected on the site of the old house and buildings; and that the trustees should be empowered to expend not exceeding 10,000*l.*, in erecting such new house and school-room.

On the 6th of August 1833, the report was confirmed and ordered to be carried into effect.

In May 1835 an Information was filed, at the relation of several inhabitants of *Manchester*, against the trustees, the Warden of *Manchester* College, the President of *Corpus*, and the High-master and Usher of the school, alleging, amongst other things, that the proceedings

1848.

THE ATT.-GENERAL v. THE EARL OF STAMFORD.

under the petition took place *ex parte*, and without the knowledge of the *Attorney-General*: that the sum proposed to be expended in building the new house and school, was extravagant and unnecessary: that the taking of boarders by the Masters of the school, was prejudicial to the day-scholars, and at variance both with the language and spirit of the foundation-deeds and statutes: that the trustees were all of them, or nearly all of them, noblemen and country gentlemen not residing in the parish of *Manchester*, and strangers to the wants and wishes of the inhabitants of the parish; and that, one of the provisions of the statutes was that all the trustees should be resident within the parish.

The Information prayed that an account might be taken of all the Charity-estates and of the rents and revenues thereof, and of the manner in which the same were applied; and that it might be referred, to the *Master*, to settle a scheme for the permanent administration and regulation of the Charity-estates, and for the conduct, discipline and studies of the school, having regard to the circumstances thereinbefore mentioned, and, more especially, to the altered habits of the times and to the greatly augmented value of the estates and to the exigences of the inhabitants of *Manchester*; and that it might be declared that it was proper and for the benefit of the Charity, that the trustees thereof should be persons who resided or occupied premises within the town or suburbs of *Manchester*; and that it might be referred, to the *Master*, to inquire and state whether it would be proper and for the benefit of the Charity, that any of the trustees should be removed, or any new trustees be appointed, and who would be proper persons to be appointed such new trustees; and that, in the mean time, the Defendants might be enjoined from proceeding

1848.

THE ATT.-GENERAL v. THE EARL OF STAMFORD.

to take any measures by entering into contracts, appointing Masters, pulling down or erecting buildings, or otherwise howsoever, for carrying into execution such parts of the order on the petition and of Lord *Henley's* scheme, as were not actually executed and completed.

The Cause was heard by Lord *Cottenham*, C., who, by his decree as it was finally settled, declared, amongst other things, that, in all future appointments of trustees, regard was to be had to the qualifications required by the statutes: that no part of the funds of the charity, were, thereafter, to be applied towards paying premiums or exhibitions to boys who were *or thereafter should be* boarders in the house of any of the Masters, except in continuing to pay exhibitions already granted, and that such boarders were not, in future, to derive any benefit from the funds of the Charity, in any manner by which the expenditure of such funds might be increased: And, with that declaration, his Lordship ordered that it should be referred, to the *Master* of the Court in rotation, to approve of such alterations in Lord *Henley's* scheme as might be necessary to carry the same into effect, and as the *Master* should find to be proper for the purpose of more effectually carrying into effect the objects of the charity, regard being had to the then amount and particulars of the property of such charity, and to any circumstances affecting the wants and situation of the boys who were the objects of the charity.

The trustees presented a petition of rehearing to Lord *Lyndhurst*, C., alleging that Lord *Cottenham's* decree was contrary to the law and practice of the Court, and praying that it might be reversed, and that the informa-

tion might be dismissed, with costs to be paid by the Relators.

On the hearing of that petition, Lord *Lyndhurst* ordered, amongst other things, that the declaration, in Lord *Cottenham's* decree, that no part of the funds of the Charity were hereafter to be applied in paying premiums or exhibitions to boys who were, or, thereafter should be, boarders in the house of any of the Masters, except in continuing to pay exhibitions already granted, and that such boarders were not, in future, to derive any benefit from the funds of the charity in any manner by which the expenditure of such funds might be increased, should be omitted, and that, instead thereof, the following words should be inserted, namely, "And it is ordered that it be referred to the said *Master*, to inquire and state to the Court, under what restrictions and limitations, and subject to what conditions (if any) the Master and Under-masters should be allowed to take boarders into their houses." *

On the 17th April 1848 the *Master* (Mr. *Dowdeswell*) made his report in obedience to Lord *Cottenham's* decree as altered by Lord *Lyndhurst*, and thereby stated that no alterations had been proposed to be made in Lord *Henley's* scheme except as thereinafter mentioned, nor did it appear to him to be proper or necessary to make any alterations therein, except for the purpose of more effectually carrying into effect the objects of the Charity, regard being had to the then amount and particulars of the Charity-property, or to any circumstances affecting the wants and situation of the boys who were the objects thereof, save as thereinafter mentioned. The *Master* then stated that the Relators, by

* See 1 Phill. 755.

1848.

THE ATT.-GENERAL v. THE EARL OF STAMFORD.

their state of facts, alleged that, owing to the practice which had, for some time past, grown up, the Masters of the school taking boarders and recommending them for exhibitions, (which practice the Relators alleged, was, for the first time, formally recognised and confirmed by Lord *Henley's* scheme,) the nature and character of the school, which was intended to be merely a day-school, had become materially altered, and the interests of the day-scholars had been, in a considerable degree, sacrificed, or were likely to be sacrificed to the interests of the boarders, and the more elementary part of the instruction given at the school, and the branches of education most adapted for and useful to the children of the middle and lower classes of the inhabitants of *Manchester* and its neighbourhood, had been much neglected, and, in a great measure, abandoned; and the school, instead of being one in which, according to the intention of the Founders, the children of all classes might receive an education suitable to their rank and station in life, had become too much dedicated to supply a highly-finished classical education, and instruction in such branches of knowledge as were useful, principally, to the children of the higher and more opulent classes of society: that the subjects of instruction most generally useful to the middling and lower classes of the inhabitants of *Manchester* and its neighbourhood, were reading, writing and arithmetic, book-keeping, modern foreign languages, mechanics, chemistry, designing and drawing: that instruction in the Latin language had become wholly unnecessary and useless, except for such children as were designed for the learned professions, of whom comparatively a small proportion resided at *Manchester*: that the foundation-deeds and statutes declared that the school was to be without any lodging for the High-master or Usher or any other person,

1848.

THE ATT.-GENERAL v. THE EARL OF STAMFORD.

and that no scholar should bring any meat or drink into the school, or there use their meat or drink; but, always, if any such poor scholars there were that, for their great poverty, brought their meat and drink with them, they should go to some house in the town, there to eat and drink, and resort again to the school; and it was also provided, by the deeds, that the Master and Usher should not take any the smallest gifts by colour of their office or for their teaching, except their stipends; but, nevertheless, Lord *Henley's* scheme authorized the trustees to build, provide, and maintain, for the Master and Usher, out of the funds of the Charity, dwelling-houses attached and immediately contiguous to the school-house, and to suffer the Master and Usher to receive, into the houses so to be provided for them, a large number of boys to board and lodge, and to make considerable profit by such board and lodging, and to receive, by colour of their office, large sums from the parents of such boys: and the Relators, therefore, proposed that the trustees should, if they saw fit, be at liberty to provide a house or apartments contiguous to the school, for the use of the High-master, rent free, and also to pay the taxes of the house; but that, in no case, should any scholar at the school be received, as a boarder, into the house of any of the Masters, and that the school, should, in every respect, be a day-school.

The *Master* further stated that the Defendants, by their state of facts, alleged that the object of the Charity was the establishment of a grammar school, at which boys in general, and, in particular, boys of the county of *Lancaster*, might be gratuitously instructed in the learned languages and in the preliminary knowledge requisite to enable them to acquire, and with a view to their afterwards acquiring, a knowledge

1848.

THE ATT.-GENERAL v. THE EARL OF STAMFORD.

of the learned languages; and which grammar school was intended to be in connection with the Universities, and to furnish a preliminary education suitable for scholars afterwards prosecuting their studies at the Universities; and that a further object of the Charity was to encourage the resort to the school and the attendance thereat, of scholars intended for the Universities, by providing exhibitions for such of them as should be in want of pecuniary assistance towards enabling them to obtain a University education: that the boys who were the objects of the Charity, were *all such boys as resorted to the school for instruction, from whatever county or shire they might come*; but the boys of the county of *Lancaster*, were, more especially, the objects of the Charity, by reason that an intention to benefit them was the chief cause of the foundation;* and because the local situation of the school made the Charity more accessible to them than to boys from other counties: that the circumstance that the children of non-resident parents, were, by the terms of the foundation-deeds, included amongst the objects of the Charity, coupled with the chance which the scholars possessed of obtaining pecuniary assistance towards a University education, had induced many parents not residing in *Manchester*, to select the school for the purpose of the preliminary education of their sons; and that the scholars of the school who were intended to be sent to the Universities, whether boarders or day-boys, remained much longer at the school, and became much more proficient in learning than the other scholars, and, for that reason and not by reason of any partiality or unfairness in awarding the exhibitions, it had happened, for a long course of years, if not from the foundation of the Charity,

* See the recitals of the deed of feoffment, 1 Phill. 738.

1848.

THE ATT.-GENERAL v. THE EARL OF STAMFORD.

that the competitors for exhibitions and the exhibitioners had been, principally, furnished from the boarders: that it appeared, from the express provisions of the foundation-deeds, that the wish of the Founders was to promote the study of the liberal arts and sciences in diversity of tongues and speeches; and, in fact, the whole of the clear funds of the Charity were applicable to grammatical and University education; the provision for elementary teaching being, originally, confined to the service of a boy, who was not to be paid anything for such service, and the whole attention of the Master and Usher being, exclusively, devoted to grammatical education: that the result of dividing the scholars into two classes, one eligible and the other not eligible to prizes and exhibitions, had been already partially experienced; for that, as soon as the effect of Lord *Cottenham's* judgment had become known to the parents of the boarders, a great proportion of them removed their sons from the school; and the boys so removed, were chiefly those who had made the greatest progress in learning, and who were desirous of proceeding to the Universities, and many of whose parents had not the means of sending them to the Universities without assistance: that the removal of the boarders, was not compensated by any corresponding increase in the number of day-scholars: that the general standard of learning and the competition and emulation amongst the scholars, was lowered and decreased: that, until the year 1840, the full number of exhibitions was always kept up; but that the number then began to decrease by reason that vacancies were not competed for; and the number of exhibitions gradually decreased until it fell to five, the then number: that the exclusion of boarders from the Masters' houses, either by a positive provision to that effect, or by making them ineligible to premiums and exhibitions,

1848.

THE ATT.-GENERAL v. THE EARL OF STAMFORD.

would convert the Charity into a school for children of the inhabitants of the township of *Manchester* only, or of parents residing within a walking distance of the school, in contravention of the purpose of the foundation-deeds: that, previously to the year 1833, all the Masters of the school had acted as they pleased with regard to taking boarders, *and that they did so without any permission, in that behalf, of the trustees*: that Lord *Henley's* scheme should be altered, by introducing into it, in conformity with the foundation-deeds, an express statement that the boys entitled to become scholars at the school, were all boys of the county of *Lancaster* or of any other county or shire, and that the scholars might reside with their parents or guardians, or with the Masters of the school, or with any other person whomsoever, as might be thought desirable by their parents or guardians, and that all the scholars were entitled, equally with one another, to all the benefits and advantages belonging to the scholars of the school; and that the scheme ought to be further altered by leaving it to the Assistant-masters, in common with the other inhabitants of *Manchester*, to determine for themselves whether they would take any, and, if any, what number of boarders.

Master *Dowdeswell* further stated that, with respect to such of the boys educated in the school as might be boarders in the house of any of the Masters of the school, not being allowed to participate in the exhibitions and premiums as sanctioned by Lord *Henley's* scheme, *it had been suggested to him, on behalf of the Attorney-General*, first, in respect of the boarders in the houses of the Masters of the school whose houses were provided at the expense of the Charity, that there appeared *to be no objection to those Masters providing board and lodging for pupils who*

1848.

THE ATT.-GENERAL v. THE EARL OF STAMFORD.

were admitted as scholars to the school, but that such privilege should be guarded by taking care that the number and the ages at which such pupils were admitted and the care of such pupils, did not interfere with the proper duties of the Masters or the general scope of the Charity itself; that the trustees had power to put any fit control upon the Masters in the exercise of that privilege; and that the limit of the number of such pupils for each Master, appeared to have been settled by Lord *Henley's* scheme; and, secondly, as to the Masters whose residences were not provided at the expense of the Charity, that *the circumstance of their taking boarders, could, hardly, be treated as a privilege*, so as to entitle the trustees to interfere, except to the extent of not suffering the Masters to be engaged in any occupation affecting their attendance and duties as such Masters: and that it had been, thirdly, suggested *that it would operate as a great injury to the prosperity of the school, if boarders, as such, were excluded from participating, in common with others, in the chance of exhibitions, and that it seemed best and not inconsistent with a liberal construction of the statutes, to admit boarders to participate in the exhibitions*, taking precaution that they should be upon an equal footing with others to compete for exhibitions, but it was also essential that the boarders, as well as all scholars who should be allowed to compete for the exhibitions, should be restricted to those who had been educated at the school, and that boys should not be allowed to enter the school and to become boarders, merely to complete their education and participate in the exhibitions, to the prejudice and discouragement of those who had been educated in the school from an early age, and that it would be proper to add an article to the scheme, to the effect that no boy should be eligible to an exhibition who had

1848.

THE ATT.-GENERAL v. THE EARL OF STAMFORD.

reduced, from 600*l.* and 300*l.*, to 450*l.* and 225*l.*, respectively.

At the hearing of the Cause for further directions,

Mr. *Bethell*, Mr. *Bacon*, and Mr. *Malins*, for the Relators, said that the taking of boarders by the Schoolmasters was inconsistent with the foundation-deeds and the statutes of the school; for it plainly appeared, therefrom, that the school was intended to be a day-school, and that the boys to be educated at it, were to be the children of the poor, and not the children of the rich; that eating, drinking, and lodging in the school were expressly forbidden; and that the Master and Usher were prohibited from taking any money or other reward from the scholars. They contended also that boys born in the county of *Lancaster*, were the only objects of the Charity. *The Attorney-General* v. *The Corporation of Ludlow* (*a*), *The Attorney-General* v. *The Earl of Devon* (*b*).

The *Solicitor-General* and Mr. *Wray*, for the *Attorney-General*, objected to the boarders being allowed to compete for exhibitions; but left it to the Court to determine whether the taking of boarders by the Masters ought to be continued.

Mr. *James Parker* and Mr. *Bagshawe*, for the trustees, referred to the case of *Rugby* school (*c*), and to Lord *Cottenham's* judgment in this Cause (*d*), and said that it

(*a*) 2 Phill. 685.
(*b*) *Ante*, Vol. XV. page 193.
(*c*) 17 Ves. 505, cited.
(*d*) 1 Phill. 745, *et seq.*

1848.

THE ATT.-GENERAL v. THE EARL OF STAMFORD.

appeared, therefrom, that his Lordship approved of Lord *Henley's* scheme, and meant it to be adopted, except so far as it might be altered in consequence of the inquiry which he directed: that that scheme sanctioned the practice of taking of boarders by the Masters, and Lord *Cottenham* meant the practice to be continued, subject only to certain restrictions: that all that his Lordship did was to regulate, prospectively, the footing upon which boarders were to continue in the school: that Lord *Lyndhurst* took a just view of Lord *Cottenham's* judgment when he said that the practice of taking boarders had been allowed by the Court, after some hesitation: and that he also held that the school was not confined to natives of *Lancashire*, but was open to boys of all counties: that what the Relators' Counsel now asked the *Vice-Chancellor* to do, was, in effect, to reverse Lord *Cottenham's* decree as well as Lord *Lyndhurst's* order on the appeal, which the House of Lords alone could do; and that the only question that was now open was, under what restrictions and subject to what limitations, the High-master and Usher ought to be allowed to take boarders.

The learned Counsel, after making the foregoing remarks on the judgments of Lord *Cottenham* and Lord *Lyndhurst*, proceeded to observe upon the statutes of the school, which, they said, did not contain any provision that prevented the High-master and Usher from taking boarders: that the statutes showed that rich as well as poor boys were intended to be at the school and to participate in the exhibitions: that nothing could be more open and liberal than the constitution of the school was; for the High-master and Usher were to teach, freely and indifferently, every scholar coming to the

1848.

THE ATT.-GENERAL v. THE EARL OF STAMFORD.

school; and no scholar, of what county or shire soever he might be, was to be refused: that the statutes prohibited the Master and Usher from taking any money or other reward "therefore," which meant, not providing board and lodging, but teaching; and that they forbade eating drinking and lodging in the school-room, but not in the houses of the High-master and Usher: that it was not even pretended that the Masters had shown any partiality to the boarders: that the High-master and Usher were the only Foundation-masters, and, consequently, the only Masters to whom the statutes applied: that they had houses provided for them out of the funds of the Charity; but the Assistant-masters had not; and, therefore, there was no more reason for preventing them than there was for preventing any of the other inhabitants of *Manchester*, from taking boarders: *The Attorney-General* v. *Hartley* (*e*): that the *Attorney-General* did not object to the Masters' continuing to take boarders, and had suggested, as appeared from Mr. *Dowdeswell's* report, that it would operate as a great injury to the school, if the boarders were excluded from participating in the chance of exhibitions, and that it seemed best, and not inconsistent with a liberal construction of the statutes, to allow them so to do.

Lastly, that the trustees were empowered to augment, increase, expound and reform the statutes; and, under that power, they had a right to allow the Masters to take boarders.

Mr. *James Russell* and Mr. *Little* appeared for the High-master and Usher.

(*e*) 2 Jac. & Walk. 353, see 376 *et seq.*

1848.

THE ATT.-GENERAL v. THE EARL OF STAMFORD.

Mr. *Wetherell* appeared for the Warden of *Manchester* College, and

Mr. *Milne* for the President of *Corpus Christi* College, *Oxford*.

Mr. *Bethell*, in reply, said, that Lord *Lyndhurst's* judgment was founded on the assumption that the trustees had altered the statutes, under the power given to them for that purpose, and had sanctioned the practice of taking of boarders (*f*): but that Master *Dowdeswell's* report, and the evidence on which it was grounded, expressly negatived that assumption: that only four of the existing trustees were resident within the parish of *Manchester*, and, therefore, all the others ought to be removed, and honest gentlemen and honest persons within the parish, ought to be appointed in their place.

The VICE-CHANCELLOR:

1849: 11th January.

In this case the great question was whether, considering what had been done by Lord *Cottenham*, and, afterwards, by Lord *Lyndhurst*, I could make a decree, which, professing to follow what Lord *Cottenham* had done, would, to a certain extent, go beyond it.

Lord *Cottenham* prefaced his decree with a declaration that no part of the funds of the Charity, was, thereafter, to be applied towards paying premiums or exhibitions to boys who were or had been boarders in the houses of any of the Masters, except in continuing to pay exhibitions already granted; and that such boarders were not, in future, to derive any benefit from the funds of the Charity in any manner by which the expenditure of such funds might be increased. But, afterwards, upon a

(*f*) ee 1 Phill. 758.

1848.

THE ATT.-GENERAL v. THE EARL OF STAMFORD.

rehearing, Lord *Lyndhurst* reversed that part of the decree, and sent a reference, to the *Master*, to the effect of inquiring whether the taking of boarders by the Masters of the school, could be attributed to any sanction given, by the trustees, to the practice. He founded himself, in that respect, upon a provision in the statutes of the school, which gave the trustees, in general terms, a power to augment, expound and reform the statutes. It appears, however, from documents which were produced before the *Master*, and, particularly, from the affidavit of Mr. *Birley* and others, that all that has been done with respect to the taking of boarders, was done *ex mero motu* of the Masters themselves; and, therefore, the whole hypothesis upon which Lord *Lyndhurst's* judgment was founded, has totally failed. That fact did not distinctly appear before Lord *Cottenham*, as it does now appear to the Court, and, therefore, though it is my duty, unquestionably, to abide by what the *Lord Chancellors* have said and done, yet, if I find that what Lord Chancellor *Cottenham* did, with what, I may call but a limited knowledge of the facts of the case, is afterwards reversed upon an hypothesis that the facts might bear out the reversal; and, it afterwards turns out that, so far from the facts of the case supporting the hypothesis, they are just the reverse, and would have authorized, if they had been known, an extension of the decree which Lord *Cottenham* made, it appears to me that I am perfectly justified, by the view which I took of the Law in the judgment which I gave in *The Attorney-General* v. *The Earl of Devon**, in declaring, in general terms,

* It would be most useful and instructive to ascertain whether the decree in *The Attorney-General* v. *The Earl of Devon*, so far as it prohibited the Master and Usher from continuing to take boarders, has been productive of good or evil to the school and the inhabitants of *Tiverton*.

that, henceforth, no boarders shall be taken by any of the Masters of the school.

Upon examining the papers before me, I do not clearly perceive what has been done, during the interval between the time when Lord *Cottenham* pronounced his decree and the present time, with respect to the admission of boarders to exhibitions. But my notion is that if, during the uncertain state of what would be the decision of the Court, the Masters have taken on themselves to admit boarders to exhibitions, they ought not to have the benefit of the exhibitions to which they have been so admitted, notwithstanding Lord *Cottenham's* decree was altered by Lord *Lyndhurst.*

I see that, with respect to the trustees, Lord *Cottenham* said (*g*): "The provision of the statutes is distinct upon this subject, and I think it is founded upon good sense; for, however advantageous it may be that the Charity should have the protection of the powerful and eminent aristocracy of the county and neighbourhood, there can be no doubt that trustees residing within the parish, and personally interested in the welfare of the inhabitants of the town, would, probably, give a more regular and vigilant superintendence to the establishment: perhaps a compound of the two would be the most desirable. But, however that may be, I find a rule laid down by the statutes, from which I do not find any reason for departing." Now it appears that there are several very opulent and eminent persons whose places of business, and, therefore, of residence during the day, are actually in the parish of *Manchester*, but who, after the business of the day is over, retire out of the parish,

(*g*) 1 Phill. 748.

1848.

THE ATT.-GENERAL v. THE EARL OF STAMFORD.

to some short distance, to enjoy, perhaps, a better air than they had during the day. The *Master* suggests that those gentlemen ought to be considered as eligible to the office of trustees; and, I confess, I think so too; and I think so, particularly, because I observe, on looking at the language of the statutes, that the expression is: "within the parish of *Manchester*;" and my opinion is that persons may be fairly said to be within the parish, who exercise their intellects in the parish during the day; and therefore I think that it is no violation of the language of the statutes, to put that construction on the words, 'within the parish,' which will comprehend those persons who do not sleep in the parish, but who do, during the day, exercise their faculties within the parish. Therefore, one of the declarations in the order on further directions, ought to be that, in future, the persons to whom I have alluded, shall be considered as qualified and eligible to be trustees of the Charity.

Declare that no boarders or boarder shall, in future, be taken by any Master or Teacher in any way employed in the school; and that none of the present boarders shall be eligible to any exhibition, scholarship, prize or premium to which the free boys in the school, are eligible. Let the future High-masters and Ushers of the school be provided, by the trustees of the school for the time being, with suitable and convenient residences, and let the rents, rates and taxes and repairs of such residences, be borne and paid by and out of the trust funds: and, in case such residences can be obtained at an expense less than the then value, to be let, of the houses and premises now occupied by the present High-master and Usher respectively, let such last-mentioned houses and premises be let or otherwise applied for the benefit of the Charity, in such manner as the trustees

1848.

THE ATT.-GENERAL v. THE EARL OF STAMFORD.

for the time being shall think proper; and, in case the High-master and Usher, or either them, shall be required to change his residence for the purposes aforesaid, let their or his reasonable expenses of such change, be paid out of the funds of the Charity: and declare that the twenty-second or last provision in the scheme contained in the schedule to the report of the *Master*, Mr. *Dowdeswell*, shall be omitted, and that, in lieu thereof, the following be inserted, namely, that it shall be lawful for the trustees to make and enforce such other and further ordinances and regulations, touching the Masters, Scholars and management of the school, as shall be consistent with the statutes and the declarations and provisions herein and in the said scheme contained: and declare that persons being otherwise qualified according to the Statutes, being occupiers of and personally engaged in carrying on business, professions or other pursuits in manufactories, warehouses or other establishments in the town or parish of *Manchester*, and having dwelling-houses and places of abode within six miles of the school-house of the Charity, shall be considered as being within the parish, for the purpose of their being eligible and shall be eligible to be appointed feoffees and trustees of the Charity: and the Defendants *Wilbraham Egerton*, *William Hulton*, *William Legh Clowes*, *William Tatton Egerton*, *John Wilson Patten*, *Francis Egerton* Earl of *Ellesmere*, and *Frederick Foster*, being all the present trustees and feoffees of the Charity, having signified their desire to resign and retire from their office as such trustees and feoffees, and the above-named Defendants, the Earl of *Stamford*, *Peter Heron*, *Hugh Hornby Birley*, *John Clowes* and *John Ford* having departed this life, therefore, by consent of all parties, declare that the said first-named Defendants be removed from their said office accordingly; and refer it

1848.

THE ATT.-GENERAL *v.* THE EARL OF STAMFORD.

to the *Master*, Mr. *Dowdeswell*, to appoint twelve proper persons to be trustees and feoffees of the said Charity in the place of the deceased and retiring trustees, and, on such appointment being made, let all proper parties join in and execute all proper feoffments, conveyances, assignments, transfers and other assurances for the purpose of vesting the Charity estates and property in the newly-appointed trustees and feoffees.

1849: 13th January.

Devise. Will. Construction.

BOYCE *v.* BOYCE.

RICHARD BOYCE made his will dated the 24th of October 1825, and, thereby, after appointing his wife *Elizabeth* and *George Wyatt* and *William Crisp* the executrix and executors thereof, expressed himself as follows:

Testator devised all his houses in *Southwold*, to trustees, in trust for his wife for life, and, after her death, in trust to convey one of them, whichever she might think proper to choose, to his daughter, *Maria*, and her heirs, and to convey all the other of them, to his daughter, *Charlotte*, in fee.

"I give and devise, to my said wife, *Elizabeth*, and to her assigns during her natural life, all that my freehold house wherein I now reside, with the yards, gardens and appurtenances thereunto belonging, now in my own occupation, and also the garden thereunto adjoining now in the occupation of *Richard Hotson* as my tenant; she, my wife, residing in the same house and premises during her natural life and permitting my three daughters, *Maria Boyce*, *Charlotte Boyce* and *Mary Ann Boyce*, so long as they shall continue single and unmarried, to dwell with her free of expense: and, from and after the

Maria died in the testator's lifetime, and, consequently, without having chosen any one of the houses. *Charlotte* survived the testator.

A general demurrer to a bill filed, by the testator's heir, to have *all* the houses conveyed to him, was overruled.

1849.

BOYCE v. BOYCE.

decease of my said wife, I give and devise the said messuage and other hereditaments hereinbefore devised to my said wife and her assigns for her life as aforesaid, unto my son, *James*, his heirs and assigns for ever: also I give and devise, unto my said son, *James Boyce* and his heirs, all those freehold messuages, tenements and hereditaments, situate in the *High Street* in *Southwold* aforesaid, where I now carry on the trade of carpenter and builder, together with all the shops, buildings and yards thereunto belonging, or adjoining thereunto, and also all that my messuage or tenement in *High Street* aforesaid in the occupation of *Richard Hotson*, with the yard, garden and appurtenances thereunto belonging; to hold to him, my said son, and his heirs: but I direct and declare that my said son, *James Boyce*, and his heirs, shall, at his and their own expense, during the life of the said *Elizabeth Boyce*, my said wife, keep the said messuage and other hereditaments hereinbefore devised to her for her life as aforesaid, in good and tenantable repair: *and all other my houses, messuages, cottages and other hereditaments lying and being in the town of* Southwold *aforesaid*, together with the furniture in my houses on the *North Cliff* there, I give and devise the same to the said *George Wyatt* and *William Crisp* and their heirs, upon trust that they shall and do stand seised and possessed thereof, during the life of my said wife, upon trust to receive the rents, issues and profits thereof during the life of my said wife, and to pay the same, as they shall be received by them or him, after paying all outgoings in respect thereof and the interest of any monies which may be due on the same, unto my said wife and her assigns during her life as aforesaid; and, from and after the decease of my said wife, *upon trust to convey and assure one of my freehold houses, whichever she may think proper to choose and elect,*

1849.

BOYCE v. BOYCE.

situate on the *North Cliff* in *Southwold* aforesaid, with the garden and yard thereunto belonging, together with the free use of the well and other the appurtenances and the furniture therein, *unto* Maria Boyce, *my eldest daughter, and to her heirs for ever;* and upon trust that they, my said trustees and their heirs, shall and do, after the decease of my said wife, *convey and assure all the other of my freehold houses which my daughter,* Maria, *shall not choose and elect,* situate on the *North Cliff* in the town of *Southwold* aforesaid, together with the yard and garden thereunto belonging, and the free use of the well and other appurtenances and the furniture therein, *to the use of my daughter,* Charlotte Boyce, *and her heirs for ever.*"

William Crisp, and the testator's wife, and all his children except his daughter, *Charlotte*, died in his lifetime. The testator died in February 1844. The Plaintiff was the son of *James Boyce*, and the testator's heir.

Wyatt renounced the probate of the will; and letters of administration with the will annexed were granted to *Charlotte Boyce*; and the bill alleged that, immediately after the testator's decease, she entered into the possession or into the receipt of the rents and profits of all the testator's freehold estates: that *Wyatt* died in October 1848, having devised his trust estates to *D. Fulcher* and *T. W. Thompson*, who, together with *Charlotte Boyce*, were the Defendants to the bill. The bill further alleged that, on the testator's decease, the Plaintiff became entitled to the testator's freehold estates as his heir-at-law: and it prayed that an account might be taken of the freehold hereditaments on the *North Cliff* in the town of *Southwold*, of or to which the testator was seised or entitled at his death, and of all

sums of money received, by *Charlotte Boyce*, since the testator's death, in respect of the rents and profits thereof; and that *Charlotte Boyce* might be decreed to pay, to the Plaintiff, what should be found due from her on taking the last-mentioned account; and that the Plaintiff's rights and interests might be ascertained and declared; and that, to such end, all proper accounts might be taken, and all necessary conveyances executed by the Defendants; and that a receiver of the rents of the said freehold hereditaments, might be appointed; and that *Charlotte Boyce* might be restrained from receiving any further part of such rents.

Charlotte Boyce and *Fulcher* demurred, generally, to the bill.

Mr. *Hodgson*, in support of the demurrer, contended that *Charlotte Boyce* was entitled, not to both,* but to one of the testator's houses on the *North Cliff* in *Southwold*. He said that *Charlotte* was not to lose what was intended for her by the will, because her sister, *Maria*, died in the testator's lifetime; but as, in consequence of that event, there was nothing to determine which of the houses on the *North Cliff*, *Charlotte* was to have, she was entitled to take whichever she pleased: and he relied on *Hobson* v. *Blackburn* (*a*), where Sir *John Leach*, M. R., stated it to be a principle of Law that, where a grant was general of ten acres adjoining or surrounding a house, part of a larger quantity, the choice of such ten acres adjoining, or surrounding, was in the grantee; and that a devise would be considered as a grant.

* It seems to have been assumed that the testator had only two houses on the *North Cliff* in *Southwold*.

(*a*) 1 Myl. & Keen, 571, see 575.

1849.

BOYCE v. BOYCE.

Mr. *Rudall*, who was with Mr. *Hodgson*, contended that *Charlotte* was entitled to *both* the testator's houses on the *North Cliff*. He said that the trust was an executory one, and that the testator intended, by it, to provide for his children; and, therefore, the Court would struggle to give effect to it: that the gift to *Charlotte* was a residuary gift; and, the gift to *Maria* having failed, *Charlotte* was entitled to both the houses. *Doe* v. *Scott* (*b*), *Sheffield* v. *Lord Orrery* (*c*), *Wheeler* v. *Walroone* (*d*).

Mr. *Bethell* and Mr. *Chichester* appeared in support of the bill: but

The VICE-CHANCELLOR, without hearing them, said that the gift in favour of *Charlotte*, was a gift, not of *all* the testator's freehold houses situate on the *North Cliff* in *Southwold*, but of all *the other* of his freehold houses which *Maria* should not choose; and, therefore, it was only a gift of the houses that should remain, *provided Maria* should choose one of them: that no choice had been, or, indeed, could have been made by *Maria*, and, therefore, the gift in favour of *Charlotte*, had failed (*e*).

Demurrer overruled.

(*b*) 3 Man. & Selw. 300.
(*c*) 3 Atk. 282.
(*d*) Aleyn's Rep. 28, and 2 Ventris, 286, cited.
(*e*) See *Roundel* v. *Currer*, 2 Bro. C. C. 67; *Lord Falkland* v. *Bertie*, 2 Vern. 333; and *Fry* v. *Porter*, 1 Mod. 300.

SCARF *v.* SOULBY.

1849: 24th November.

Debtor and Creditor. Voluntary Settlement.

It is not sufficient for a creditor who seeks to set aside a voluntary settlement made by his debtor, to show, merely, that the settlor was indebted when he executed the settlement; but it is not requisite for him to show that the settlor was *insolvent* at that time.

SOME time after the report of this case (*ante*, page 344) had been printed, an appeal from the decree was heard by the *Lord Chancellor*.

His Lordship, after expressing his approbation of the judgments in *Richardson* v. *Smallwood* (*a*) and *Townsend* v. *Westacott* (*b*), held, as the *Vice-Chancellor* had done, that, in order to invalidate a voluntary settlement, it was not requisite to show that the settlor was insolvent at the time when he made the settlement; but differed from his Honour as to its being sufficient to show that the settlor was indebted at that time; his Lordship being of opinion that the mere fact of a debt existing at the execution of the settlement, was not sufficient, *per se*, to invalidate the instrument. He concluded by saying that there was nothing in the case which enabled him to proceed upon the ground that the settlement was void; but that there was sufficient to entitle the parties to an inquiry, in order to enable the Court to determine whether the settlor made the settlement with intent to delay, hinder or defraud his creditors. And, accordingly, his Lordship reversed the decree and directed the *Master* to inquire and state what debts the settlor owed at the time when he executed the settlement and at his death, and what, at the execution of the settlement, was the amount of his property not included in it.

(*a*) Jac. 552. (*b*) 2 Beav. 340.

Jenkyns v Vaughan 3 Drewry 423.

1849.

MEMORANDUM.

In November 1849, the *Lord Chancellor* affirmed the decrees in *Cooke* v. *Turner*, reported *ante*, Vol. XV. page 611; and in *Christ's Hospital* v. *Grainger*, reported *ante*, page 83.

ONSLOW *v.* WALLIS.

1849: 16th January.

Trustee.

A. being entitled, in fee, to freehold hereditaments, the legal estate in which was vested in *N.*, devised the hereditaments to *O.* and *P.* in trust to sell them, for payment of her debts, and died without an heir. *N.* offered to pay the debts, and, subject to the payment of them, claimed to hold the hereditaments for his own benefit. But the Court decreed him to convey them to *O.* and *P.*

IN July, 1837, certain freehold hereditaments were conveyed unto and to the use of the Defendant's father in fee, in trust, in case *Louisa*, the wife of *A. L. Sarel*, should survive her husband, for her and her heirs.

The Defendant's father died in April 1842, intestate as to his trust-estates. The Defendant was his heir. Mrs. *Sarel* survived her husband and died in September 1847, having devised her real estates to the Plaintiffs and their heirs, in trust to sell, and, out of the proceeds, to pay her debts and the legacies which she said she had given by a memorandum signed by her and marked *A*.

The testatrix left no heir. After her death, search was made for the memorandum, but it could not be found. Her personal estate, however, was not sufficient to pay her debts.

The object of the bill was to compel the Defendant to convey the legal estate in the hereditaments, to the Plaintiffs, as the devisees in trust under the will. The Defendant, by his answer, offered to pay all the testatrix's debts which her personal estate was insufficient to pay, and insisted that, subject to the payment of them, he was entitled to hold the hereditaments for his own benefit.

Mr. *Bethell* and Mr. *Bird* appeared for the Plaintiffs.

Mr. *Rolt* and Mr. *Prior*, for the Defendant, said that

1849.

ONSLOW v. WALLIS.

the testatrix had devised the hereditaments, to the Plaintiffs, for a limited purpose only; and, therefore, there was no obligation, on the Defendant, to convey the hereditaments to the Plaintiffs, out and out; that, if the Defendant satisfied the purpose, (as he undertook to do,) and the testatrix had left an heir, he would have been a trustee, of the residue of the hereditaments, for the heir; but, as she had left no heir, he was entitled to hold the residue for his own benefit: *Burgess* v. *Wheate*(*a*), *Henchman* v. *The Attorney-General* (*b*), *Taylor* v. *Haygarth* (*c*).

The *Vice-Chancellor*.—Has not the testatrix shown that she intended the Plaintiffs to have all the benefit from the estate, which the Defendant would have had?

Argument resumed.—The testatrix has not shown any intention to take the hereditaments out of the Defendant, except for the purpose expressed in her will. Suppose that she had devised them to the Plaintiffs, in trust to pay 100*l*. to *A. B.*, and that the Defendant undertook to pay that sum, would the Court have decreed him to convey the hereditaments to the Plaintiffs?

The VICE-CHANCELLOR:

Every person must be supposed to know the Law: and, if it be the Law that the trustee of an estate is entitled to hold it for his own benefit, where there is no trust to be performed, the beneficial owner, by directing the trusteeship to be changed, shows that she intends the substituted trustees to take any benefit that may

(*a*) 1 Eden, 177. (*b*) 3 Myl. & Keen, 485.
(*c*) *Ante*, Vol. XIV. page 8.

arise from their being trustees: they take the benefit, because she intended them to be trustees. Therefore, I shall decree the Defendant to convey the hereditaments to the Plaintiffs, according to the prayer of the bill.*

1849.
ONSLOW
v.
WALLIS.

* Affirmed by the Lord Chancellor, see 1 Macnaghten & Gordon, 506.

CHIPCHASE *v.* SIMPSON.

1849:
19th January.

Will.
Construction.

Testator gave 1000*l.* to his sister for her, *or* for her children's *sole* use and benefit for ever; and directed his executors to pay the same to her as soon as practicable.

Held that the word 'or' was to be taken, disjunctively, and that the testator intended his sister to take the 1000*l.* absolutely and exclusively, (but not for her separate use,) if she survived him; but, if she did not, that it should go to her children.

THE testator in this Cause, by the third clause of his will, gave to his sister, *Jane Chipchase*, 1000*l.* for her *or* for her children's *sole* use, benefit and behoof for ever; and directed his executors to pay the same to her as soon as practicable. By the fourth clause, he gave 1000*l.* to *Hannah Thompson*, for her, or, in case of her decease, for her children's sole use and benefit for ever; and desired his executors to pay the same as soon as possible. By a codicil, he confirmed his will and all matters, bequests and things therein contained, and then expressed himself thus: "But, being desirous of making further bequests in relation to my sister, *Jane Chipchase*, *and* her family, I do make this codicil to my said will, to be taken and received as an additional part thereof. First, in addition to the bequest made in my said will to my sister, *Jane Chipchase*, I request my executors, in their own names, to purchase a farm in the United States of *America or* in *Canada*, for a sum not exceeding 600*l.*, and to allow my brother-in-law, *John Chipchase*, the husband of my said sister, *Jane Chipchase*, and his family, to use and occupy the same, rent-free, so long as he shall live, but the use thereof not to be subject to his disposal, *or*, in any manner, subject to his debts; and, after his

1849.

CHIPCHASE v. SIMPSON.

decease, the said farm to become solely the property of my said sister, *Jane Chipchase*, and her children for ever. Secondly, in order to enable the said *John Chipchase* properly to stock and manage the said farm, I give and bequeath unto him the sum of 400*l.* to be paid to him for his sole use and benefit for ever; *or*, in case of his death, to be paid to my said sister, *Jane Chipchase*; *or*, in case of her death, then to be paid to her children, share and share alike. Thirdly, I desire my executors to invest the sum of 1000*l.* in the funds, as a separate and distinct fund, and to, annually every year thereafter, pay the interest or dividends arising or received therefrom, to my sister, *Jane Chipchase*, towards her support and enabling her the better to support, clothe and educate her children; and I desire that she may continue to receive such interest or dividends arising therefrom, during her life or until her youngest child then living shall arrive at twenty-one years of age; at which period last-mentioned, her said children shall be entitled to receive the said fund of 1000*l.*, to be divided among them share and share alike for ever."

The bill was filed by *John Chipchase* and *Jane* his wife, against their children (some of whom were born in the testator's lifetime, and others after his death) and the executors of the will and codicil. One question was whether the word 'or,' in the third clause of the will, was to be taken disjunctively or conjunctively. Another question was whether the 1000*l.*, given by that clause, was given for the separate use of *Jane Chipchase*.

Mr. *Bethell* and Mr. *Hallett*, for the Plaintiffs, contended that the word 'or,' was to be taken disjunctively, and that the testator intended *Jane Chipchase* to take

the 1000*l.*, absolutely and exclusively, if she survived him; but, if she died in his lifetime, that her children should take it.

Mr. *James Parker* and Mr. *Giffard*, for the executors, submitted that it was doubtful whether the 1000*l.* was not given for the separate use of *Jane Chipchase*, and, therefore, that the suit ought to have been instituted by her alone.

Mr. *Rolt* and Mr. *Roundell Palmer*, for the children of *Jane Chipchase* born in the testator's lifetime, contended that the word, 'or,' was to be taken conjunctively: first, because the testator, in the prefatory part of his codicil, had referred to the bequest made by that clause, as a bequest for the benefit of his sister *and* her family: and, secondly, because the bequest would be void for uncertainty, if that word were taken disjunctively. They added that, in order to give effect to the claim made by the Plaintiffs, the Court must construe the clause, not as it stood, but as if it contained the words: "but in case my said sister shall die in my lifetime," which the Court was not at liberty to do.

Mr. *Malins*, for the children born after the testator's death, contended that *Jane Chipchase* was entitled to the 1000*l.* for her life, with remainder to her children; and relied on *Newman* v. *Nightingale* (*a*) as being precisely in point.

The VICE-CHANCELLOR:

The testator has used the word, 'or,' frequently in his codicil, and always in its proper, disjunctive sense; there-

(*a*) 1 Cox, 341.

1849.

CHIPCHASE v. SIMPSON.

fore, I must infer that he used it disjunctively in his will. Moreover, he has directed his executors to pay the 1000*l.* to his sister, as soon as practicable. This direction puts an end to all question. His meaning was that his sister should have the 1000*l.* if she survived him; but, if she did not, that it should go to her children. I do not, however, think that he intended to give it to her for her separate use. Therefore I shall direct it to be paid into Court, to her account, with liberty to her and her husband to apply.

1849: 20th January.

Accumulation. Thellusson Act. Portions. Heir.

HALFORD *v.* STAINS.

EX PARTE THE DEFENDANT ELIZABETH STAINS.

WILLIAM STAINS, by his will dated the 16th of November 1824, devised estates in the county of *Kent*

Testator devised his freehold estates to trustees in trust to accumulate the rents during the life of his niece, and, on her decease, to stand seised of the estates, to the use of her first and other sons in tail.

The testator died in 1827, leaving his niece surviving.

Held that the trust for accumulation became void at the end of twenty-one years after the testator's death, and that the testator's heir was entitled to the rents during the remainder of the niece's life.

Testator directed the rents of his freehold estates, and the income of his residuary real personal estate, to be accumulated, in order to provide for the younger children of his niece, and of *E. S.*, each of whom took an interest under his will; and, in the clauses for the maintenance and advancement of the children, he termed the provision which he had so made for them, sometimes *their portions*, and, sometimes, their *portions or shares*.

Held that the provision was not a provision for raising portions within the meaning of the proviso in the second sect. of the Thellusson Act, and, therefore, was not exempted from the operation of the first section.

Bourne v Buckton 2 Sim. N. S. 91. Beech v Ld St Vincent 3 Sel. W. 683. Barrington v Liddell 2 D. M. & G. 498. Edwards v Tuck 3 id 62.

1849.

HALFORD v. STAINS.

which he described, and all his other real estates not thereinafter well and effectually given and devised by him, to the Plaintiffs and their heirs, in trust, during the life of his niece, *Elizabeth Stains*, to make certain payments out of the rents, (*one of which was an annuity to Elizabeth Stains in case she married A. Smith*, but which she did not do,) and to lay out the residue of the rents, or any part or parts thereof, in the purchase of freehold estates in the same county, and to settle, convey and assure the estates so to be purchased, to the same uses, &c., as were declared, by his will, concerning the estates thereinbefore devised: and in trust, (at the discretion of the Plaintiffs,) as to such part or parts of the said residue as should not be laid out in such purchase or purchases as aforesaid, and also, until such purchase or purchases should be made as aforesaid, as to the whole of the said residue, to lay out the same in the securities therein mentioned, and to change such securities, from time to time, at their discretion, either by making such purchase or purchases as aforesaid, or into other securities of the like nature, and to invest the interest and dividends of such securities in manner aforesaid, so that the same and all the resulting income and produce thereof, might accumulate in the nature of compound interest: and, immediately after the death of his niece, to stand possessed of all the securities so directed to be purchased and accumulated, upon the trusts thereinafter declared concerning his residuary personal estate, of which the same was to be deemed a part: and, after the death of his niece, to stand seised of all the estates thereinbefore devised, to the use of her first and other sons in tail male; *with remainder to the use of the Defendant*, Edwin Stains, *for life;* with remainder to the use of his first and other sons in tail male; with remainder to the use of all the children of *John Palmer*,

1849.

HALFORD v. STAINS.

as tenants in common in tail, with remainder to the testator's right heirs: And the testator gave all his stocks, funds, monies, mortgages, ready money and securities for money, and also the securities thereinbefore directed to be purchased and accumulated, and all the residue of his personal estate, to the Defendants *Buckton* and *Bourne*, in trust to sell such parts thereof as should not consist of stocks, funds, monies, mortgages and securities for money, and, to get in such parts thereof as should consist of monies or securities for money, and, at their discretion, to lay out the money to arise by such sale or sales and to be got in as aforesaid, or any part or parts thereof, in the purchase of freehold estates in *Kent*, which he directed to be conveyed to the same uses and upon the same trusts as were thereinafter declared concerning such part or parts of his said net monies as should not be laid out, by his trustees, in such purchase or purchases as aforesaid:* and in trust, at their discretion, as to such part of the said net residue as should not be laid out in such purchase or purchases as aforesaid; and also, until such purchase or purchases should be made as aforesaid, as to the whole of the said net monies, to lay out the same in the securities therein mentioned, and to receive the dividends and interest of such securities and again lay out the same in manner aforesaid, so that the same and all the resulting income and produce thereof might accumulate, in the way of compound interest, during the life of his niece; and, after her decease, in trust to transfer the securities and accumulations, to her child, if only one, and, if more than one, to her children, exclusive of an elder or only

* This will was correctly copied from the brief. The testator seems to have studied Erasmus *de copiâ verborum*, but not to have acquired the perspicuity of the author's style.

son, (such only son not being an only child,) equally as tenants in common, and to be vested in the male children at twenty-one, and in the female, at that age or on their marriage. And the testator declared that if any of the male children should attain twenty-one, or any of the female children should attain that age or marry and should die before their mother and leave issue, such issue should stand in the place of and take *the share* of the securities which their parent would have been entitled to, if living, and should take the same in equal shares, and that the shares should vest in the male issue at twenty-one and in the female, at that age or on their marriage: and the testator further declared that, in case any of the younger children of his niece should die before her, without leaving issue who should be living and have acquired a vested interest at her death, the trustees should transfer *the shares* of the children who should so die as last aforesaid, to the survivors or others of the same children (but exclusive of an eldest or only son, unless he should be an only surviving child,) and the issue of such of the same children as should be then dead leaving issue, such issue taking only *the shares* which their parents would have been entitled to if living, and taking the same in equal shares, and that the same should be vested interests in the male issue, at twenty-one, and in the female, at that age or on their marriage.

The testator then empowered *Buckton* and *Bourne*, after the death of his niece, to apply any part of the income arising from *the portion* of any of her children and issue, of and in the said trust-securities, for the maintenance of such child or issue during his or her minority; and also to apply not exceeding one half of the then vested or expectant *share* of any such child or issue, of and in the said trust-securities, for his or her advancement in the world; and he directed that the sum

1849.

HALFORD v. STAINS.

which should be advanced for each such child or issue, should be considered as part of his or her *portion or share*, and should be deducted and allowed out of the same, notwithstanding his or her death before his or her *portion* should be absolutely vested; and that so much of the income arising from the *portion or share* of each such child or issue as should not be applied for the maintenance or advancement of the child or issue to whom the same *portion or share* should belong, should be added, from time to time, to the principal of the same *portion or share*, and be improved at interest together with the same, and be subject to all the limitations, trusts and dispositions thereinbefore and thereinafter expressed concerning the principal of the same *portion or share*, until the principal should become payable.

The testator then directed that, on failure of the before-mentioned trusts, *Buckton* and *Bourne* should stand possessed of the trust-securities, upon like trusts, for the benefit of the children and issue of *Edwin Stains*, and of the children and issue of **Henry Palmer*, successively; and, on those trusts also failing, in trust for his own next-of-kin according to the Statutes of Distribution: and he appointed *Buckton* and *Bourne* his executors.

* *Sic.*

The testator died in 1827. His brother, *James Stains*, was his heir both at law and in gavelkind, and, also, his sole next-of-kin. *James Stains* died, in 1828, intestate as to any real estate which descended to him from the testator. *Buckton* was his executor as well as one of the executors of the testator. *Elizabeth Stains* was the only child and heir, both at law and in gavelkind, of *James Stains*; and, on his death, she became such heir to the testator.

In December 1848 she presented a petition in the

Cause, stating, amongst other things, that, after the testator's death, the Plaintiffs entered into the possession or receipt of the rents of the estates devised to them in trust as aforesaid, and invested and accumulated such rents; and, thereout, amongst other things, purchased a piece of land and a farm in *Kent*, which were conveyed to them upon the trusts declared, by the will, of the estates which should be purchased with the rents of the devised estates, and that they, afterwards, accumulated and invested the rents of such purchased estates: that, in January 1843, they transferred and paid 600*l.* Consolidated and 2499*l.* 2*s.* 1*d.* Reduced Bank Annuities, and 107*l.* 9*s.* 6*d.* cash (which had arisen from the surplus rents of the devised estates) into Court, to the credit of the Cause, to the account of the testator's real estates: that the decree in the Cause, dated the 12th of July 1844, directed the *Master* to inquire and state of what the freehold estates, expressed to be devised by the will, consisted; and to take an account of the rents, of those estates, received by the Plaintiffs; and to inquire and state whether the Plaintiffs had applied and invested any and what part of such rents, or of the stocks, funds, securities or monies derived therefrom, in the purchase of any and what real estates; and whether they had invested any and what part of such rents in any and what stocks, funds or securities; and, if so, that the *Master* should take an account of the rents, interest and dividends of all such purchased estates, stocks, funds and securities received by the Plaintiffs. The petition next stated that divers proceedings had been had, before the *Master*, under the decree, but the *Master* had not made his report: that the period of twenty-one years, computed from the day of the testator's death, ended on the 24th of September 1848: that the petitioner was advised *that the trust for accumulation, contained in the will, was good for such period and no longer, and that,*

1849.

HALFORD v. STAINS.

at the expiration thereof, she, as such heir at law and in gavelkind as before mentioned, became entitled to the rents of the devised and purchased estates, and to be let into the possession or receipt of the rents thereof as from the 24th of September 1848, *and also to receive the dividends and interest arising from the past accumulation of the surplus rents of the said estates, subsequently to the last-mentioned day,* and that, on that day, 3843*l.* 7*s.* 2*d.* Consolidated, and 1620*l.* 9*s.* Reduced Bank Annuities, and 23*l.* 12*s.* cash, the October dividend on the latter sum, were standing to the credit of the Cause, to the account of the testator's real estates. The petition prayed that the receiver in the cause might be ordered to let the petitioner into the possession or receipt of the rents of the real estates as from the 24th of September 1848; and that the 23*l.* 12*s.* cash, and all the future dividends of the two sums of stock, might be ordered to be paid to her.

Mr. *James Parker*, in support of the petition, contended that, under the Thellusson Act, (39th & 40th Geo. III. c. 98, sect. 1,) * the trusts created, by the

* That section enacts: "That no person or persons shall, after the passing of this Act, by any deed or deeds, surrender or surrenders, will, codicil or otherwise howsoever, settle or dispose of any real or personal property, so and in such manner that the rents, issues, profits or produce thereof, shall be, wholly or partially, accumulated for any longer term than the life or lives of any such grantor or grantors, settlor or settlors, or the term of twenty-one years from the death of any such grantor, settlor, devisor, or testator, or during the minority or respective minorities of any person or persons who shall be living or in *ventre sa mere* at the time of the death of such grantor, devisor or testator, or during the minority or respective minorities only of any person or persons who, under the uses or trusts of the deed, surrender, will or other assurances directing such accumulations, would, for the time being, if of full age, be entitled unto the rents, issues and profits, or the interest, dividends or annual produce so directed to be accumu-

will, for accumulating the rents of the estates devised to the Plaintiffs, and for accumulating the dividends of the stock purchased by them, became void on the 24th of September 1848, when the period of twenty-one years from the testator's death, expired; and that the petitioner was entitled to the rents which became due in October 1848, without any apportionment, and also to the dividends of the stock which became due in the same month.

Mr. *Bethell* appeared for the Defendant *Robert Stains*, the son of *Edwin Stains*, who was born pending the suit, and was brought before the Court, by bill of supplement, as being the first tenant in tail *in esse* under the will.

Mr. *Kenyon*, for the Defendant *Bourne*, said that the petitioner and *Edwin Stains*, took, each of them, an interest under the will; and that the benefits intended, by the testator, for their children were portions in the proper sense of the word, and were so termed by the testator; and, therefore, the trust for accumulating the dividends of the stock was good under the second section of the Act,* as being a provision for raising portions for the children of persons who took interests under the will.

---

lated; and, in every case where any accumulation shall be directed otherwise than as aforesaid, such directions shall be null and void, and the rents, issues, profits and produce of such property so directed to be accumulated, shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, *go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed.*"

* That section is as follows: "Provided always and be it enacted, that nothing in this Act contained, shall extend to any provision for payment of debts of any grantor, settlor or devisor, or other person or persons, or to any provision for

1849.

HALFORD v. STAINS.

Mr. *James Parker*, in answer to Mr. *Kenyon's* argument, referred to *Shaw* v. *Rhodes* (*a*).

The *Vice-Chancellor*.—I do not think that the trust, for accumulating the dividends of the stock, can be said to be a provision for raising portions, within the meaning of the second section of the Act. The portions there spoken of, seem to me to be portions charged on property under some instrument prior to the will, and from which the provision made by the will, is intended to relieve that property. Besides, the testator has put his own interpretation on the word, 'portion'; he has shown that he meant by it, 'a share.'

Mr. *Chandless*, for the Defendant *Buckton* in his character of personal representative of *James Stains*, the testator's brother and heir and the father of the petitioner, said that the petitioner had misconceived her case; for the interest in the testator's real estates which vested in her father, was not a descendible interest, but an estate *pur autre vie*, namely, for the life of petitioner, during whose life the rents were directed to be accumulated; and, there being no special occupant, that, under the sixth section of the Wills Act (*b*) that estate vested, on the death of *James Stains*, not in his heir, but in *Buckton*, his personal representative. *Sewell* v. *Denny* (*c*).

---

raising portions for any child or children of any grantor, settlor or devisor, or any child or children of any person taking any interest under such conveyance, settlement or devise, or to any direction touching the produce of timber or wood upon any lands or tenements; but that all such provisions and directions shall and may be made and given as if this Act had not passed."

(*a*) 1 Myl. & Cr. 135.

(*b*) 7 Will. IV. & 1 Vict. c. 26. The Testator died long before this Act was passed.

(*c*) 10 Beav. 315.

1849.

HALFORD v. STAINS.

Mr. *James Parker* (in reply) referred to the concluding words of the first section of the Thellusson Act: "shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to such person as would have been entitled thereto if such accumulation had not been directed."

The VICE-CHANCELLOR:

The interest in the estates which was not well disposed of by the will, was part of the inheritance; and, therefore, it descended, on the testator's death, to the petitioner's father, as his heir in gavelkind; and the petitioner is now entitled to it as heir to her father.

Order made according to the prayer of the petition.

SMITH *v.* PINCOMBE.

1849: 18th and 25th January.

Practice.

An order giving a Defendant liberty to examine a Co-defendant as a witness, need not be served on the Plaintiff.

Depositions.

Witnesses were examined, for a Defendant, *under a commission* in the country. Twenty days after publication, the Plaintiff served a notice of motion to suppress the depositions, because no notice of the names, &c., of the witnesses had been given to her. Motion refused on account of the delay in serving the notice, and because the Plaintiff's solicitor was present during the execution of the commission, at the inn at which it was executed, knew what was taking place, and saw and conversed with the witnesses.

MOTION for Plaintiff, that the depositions of the Defendant *T. Pincombe* taken on behalf of the Defendant *W. Pincombe*, might be suppressed, on the ground that the order for the examination of *T. Pincombe* was not served either on the Plaintiff or her solicitor or agent: and that the depositions of the other witnesses examined in the Cause on behalf of the Defendant *W. Pincombe*, might be suppressed on the ground that no notice was given, by *W. Pincombe* or on his behalf, to the Plaintiff or to her solicitor or agent, of the

1849.

SMITH v. PINCOMBE.

names, rank or occupations, ages or places of abode of the witnesses.

The witnesses were examined, *under a commission in the country*, in August 1848. Publication passed on the 4th of November in that year; and the notice of motion was served, on the 24th of the same month, for the 2nd of December following. It appeared, from the affidavits, that the Plaintiff's country solicitor was at the inn at which the commission was executed, during the time of its execution, and saw and conversed with the witnesses.

Mr. *Bethell* and Mr. *Terrell*, in support of the motion, referred to *Mulvany* v. *Dillon* (*a*), *Ellis* v. *Deane* (*b*), *Dan.* Ch. Pract. 865; 1 *Newland's* Ch. Pract. 267; *Taylor* v. *Harrison* (*c*), *Dearman* v. *Wych* (*d*), and *Young* v. *Smith* (*e*), and 1 *Dan.* Ch. Pract. 853.

Mr. *Rolt* and Mr. *Follett*, for the Defendant *W. Pincombe*, said that, if witnesses were examined in *London*, notice of their names and descriptions must be given to the adverse party, under the 26th General Order of Oct. 1842 (*f*); but that, if they were examined in the country, such notice need not be given, unless the adverse party had given notice of his intention to attend the execution of the commission; which the Plaintiff in this case had not only not done, but her solicitor had stated, to several persons, that he did not mean to attend the execution of the commission: that Sir *John Leach* had decided that it was not necessary to serve the Plaintiff in a cause, with an order allowing a Defendant to exa-

(*a*) 1 Ball & Beatty, 409.
(*b*) 3 Molloy, 48.
(*c*) 1 Myl. & Cr. 274.
(*d*) 4 Myl. & Cr. 550.
(*e*) 3 Madd. 196.
(*f*) Beav. Ord. 216.

mine a Co-defendant; and that, in consequence of that decision, the Secretary at the Rolls had struck the words: "and hereof give notice forthwith," out of the order, and had inserted the words: "saving just exceptions," in their place.

The VICE-CHANCELLOR:

It is not necessary for me to determine the question that has been argued; for my opinion is that the circumstances of the case forbid me to grant the motion.

It appears that the Plaintiff's solicitor attended at the place at which the witnesses were examined whilst the examination was going on, and that he not only saw but conversed with the witnesses. It appears also that, the examination having terminated on the 9th of August, publication passed on the 4th of November; but no notice of motion to suppress the depositions, was given until the 24th.

My opinion is that, after so long a delay, it would be quite wrong for the Court to interfere. Publication has passed, and the party moving has had an opportunity of ascertaining the weight of the evidence; and no attempt was made, until twenty days after publication, to rectify the error.

Motion refused with costs.*

* Affirmed 1 Hall & Twells, 250.

1849:
26th January.

JONES *v.* HALL.

Will.
Construction.
Joint-tenancy.

Testator gave all the property he possessed in the parish of *K.*, consisting of houses, lands, debts, ready money and other effects which he then possessed or might possess at the time of his decease, and also all his funds in the Bank of *England* or that of the United States of *America*, to his reputed children, *Anthony, James* and *Richard*, and their heirs, share and share alike, as soon as they should have attained twenty-one: it being his will that if one of them should die before he attained that age, his share *should vest in and belong to the survivors. James* died under twenty-one leaving *Anthony* and *Richard* surviving.

Held that the share of the testator's property, which *James* would have been entitled to if he had attained twenty one, vested in *Anthony* and *Richard*, as joint-tenants.

ANTHONY JONES, of *Kingston, Jamaica*, being possessed of stock in the *English* funds and other property, made his will in the *French* language, and, thereby, as the bill stated, after directing that the whole of his estate, real and personal, should be subject to the payment of his debts, he declared that he named and instituted, as his heirs, the Plaintiff *Anthony Michel Jones*, and *James Jones* and *Richard Jones*, his three reputed children gotten by him on the body of *Marie Adelaide Payan*, to whom, his said three reputed children, he gave and bequeathed all the property he possessed in the parish of *Kingston*, consisting of houses, lands, slaves, debts, ready money and other effects, generally, whatsoever, which he then possessed or might possess at the time of his decease; and also all the funds, *in specie*, which were then placed either in the Bank of *England* or that of the United States of *America*, for them, his said three reputed children, the Plaintiff and *James Jones* and *Richard Jones*, to enjoy and dispose of such the whole of his said estate, *share and share alike*, they and their heirs for ever *as soon as they should have attained the ages of twenty-one years:* it being his will and intention that if one of his children before named, should happen to die before he attained the age of

1849.

JONES v. HALL.

twenty-one years, *his share and portion in his said estate, should vest in and belong to the survivors:* and he willed and directed that the *Penn* on which he then resided, should be sold immediately after his decease, as well as all and every the slaves which he possessed, either by private contract or public auction; empowering and authorizing his executors thereinafter named to fulfil all the formalities in the respect required in consequence;* the net proceeds which should arise from the sale of the said *Penn* and of the said slaves, as well as the specie, in gold or in silver, which he might have in the house, the whole should be remitted, by his said executors, to be placed in the Bank of *England* with the other funds he had there already; and his executors were directed to draw, out of the interest of the whole of the said funds, what should be necessary for the maintenance and education of his said three children before named; it being his will that, under no pretence whatever, any part of the said funds then placed or to be placed in the said Bank of *England*, should be touched before his said children had attained the age of twenty-one years. It was also his will that the funds which were placed in the Bank of the United States of *America*, should remain there untouched, as well as the interest which might accrue thereon, until his said three children should have attained their age of twenty-one years, at which period they should have it in their power to dispose of the same share and share alike: the testator, however, declared that the store purchased by him from Mrs. *Codd*, situate in *Port Royal Street* and then occupied by Messrs. *Hoyes*, should be excepted from his above disposition; it being his will and intention that this property should particularly belong to the Plaintiff, who should dispose thereof as he might think proper when he should have attained the age of twenty-one years; and, until that

* *Sic.*

1849.

JONES v. HALL.

period, the rents of that store should be applied in aid of providing for the wants of his said three children.

The will, according to a copy of the record of it in *Jamaica*, was as follows:* "Je veux et ordonne que toutes les justes dettes que je pourrais avoir contractés, ainsi que les dépenses de mes funerailles, soient payées et acquittées aussitot que possible après mon décès, au payment de quoi je soumets et assujettis toute ma succession soit réelle soit personelle. Je declare nommer et instituer pour mes héritiers, *Anthony Michel Jones*, *James Jones* et *Richard Jones*, mes trois enfans naturels nés de moi et de *Marie Adelaide Payan*, aux quels mes trois enfans naturels ci-dessus nommés, je donne et légue toutes les propriétés que je puis posséder dans la paroisse de *Kingston*, en maisons, terres, esclaves, creances, argent comptant, et autres objects, généralement, quelconques, que je posséde dans ce moment, ou posséderai à l'époque de mon décès, en outre tous les fonds en numéraires qui sont présentement places soit a la Banque *d'Angleterre*, soit a cette des Etats Unis de *l'Amerique*, pour mes trois enfans naturels ci-dessus nommés, *Anthony Michel Jones*, *James Jones* et *Richard Jones*, jouir, faire et disposer de la totalité de ma succession par égalle portion, pour eux, leurs héritiers et pour toujours, et ce aussitôt qu'ils auront atteint chacun l'age de vingt-un ans, voulant et entendant que si l'un de mes enfans ci-dessus nommés venait à décéder avant l'age de vingt-un ans, que sa part et portion dans les biens de ma succession, revienne et appartienne aux survivans. Je veux et ordonne que le *Penn* sur lequel je demeure présentement, soit vendu immediatement après mon décès,

* The Reporter is not responsible for the errors in grammar or orthography.

1849.

JONES v. HALL.

ainsi que tous les esclaves que je puis posseder, soit par contrat privé soit publiquement, donnant pouvoir et autorité a mes exécuteurs ci-aprés nommés, de remplir les formalités a cet égard, en conséquence: le produit net qui proviendra tant du dit *Penn*, que des esclaves d'ont j'ai déjà parlé, ainsi que les especes d'or ou d'argent que je puis posséder dans ma maison, le tout sera envoyé par mes exécuteurs pour être placé a la Banque *d'Angleterre* avec les autres fonds que je y ai deja, et sur la totalité desquels fonds mes executeurs préléveront, sur l'interêt, ce qui sera necessaire pour l'entretien et l'éducation de mes sur dites enfans surnommés, ne voulant pas, sous aucun prétexte, que l'on touche au capital des fonds qui sont placés et seront placés a la ditte Banque *d'Angleterre*, avant que mes dites enfans n'ayent leur age de vingt-un ans. Je veux, également, que les fonds qui sont placés a la Banque des Etats Unis de *l'Amerique*, demeurent sans y toucher aucunement, avec les interêts qu'ils puivent produire, et ce jusqu'au moment que mes dites trois enfans soient agés de vingt-un ans, epoque a la quelle ils pourront en disposer par egale portion, ainsi que je l'ai dejà supliqué. Je déclare, neanmoins, que le magazin par moi acheté de Mrs. *Codd*, situé dans *Port Royal Street*, et occupé, presentement, par Messieurs *Hoyes*, sera extrait des mes dispositions, ci-dessus endorcees, voulant et entendant que cette propriété demeure, particulierement, pour mon fils naturel, *Anthony Michel Jones*, lequel pourra en disposer comme bon lui semblera, assistot qu'il sera agé de vingt-un ans, et jusqu' à cette époque la rente de ce magazin sera employé pour aider aux besoins de mes enfans."

All the testator's reputed children named in his will, survived him: but two of them, *James* and *Richard*, died

1849.

JONES v. HALL.

under twenty-one; *James*, in 1833 and *Richard*, in 1844. *Anthony* attained twenty-one in 1834 and was the Plaintiff in the Cause.

The question was whether he was entitled to *the whole* of the testator's stock in the *English* funds, or whether *Richard's* personal representative was entitled to the share which accrued to *Richard* on the death of *James*.

Mr. *James Parker* and Mr. *Oliver*, for the Plaintiff, said that the bequest on which the question arose, was a residuary bequest, and that nothing vested under it until a child attained twenty-one, or, if anything did vest, that it went over on the child dying under twenty-one.

Mr. *Bigg*, for the personal representative of *Richard Jones*, said that *Richard's* original share of the stock went over, to the Plaintiff, on his dying under twenty-one; but that the share which accrued to him on *James's* death, did not go over, but vested absolutely in him.

The *Vice-Chancellor* said that, under the bequest in question, the Plaintiff and *Richard* became, on *James's* death, joint-tenants of the share which would have vested in *James* if he had lived to attain twenty-one; and directed the whole of the stock in Court, and the cash arisen from the dividends of it, to be transferred to the Plaintiff.

WHEABLE *v.* WITHERS.

1849:
9th February.

Will.
Construction.

Testator devised his real estates to trustees, in trust to convey them to his children, as tenants in common, on their attaining twenty-one; and, in case of the death of any of them, without issue, under that age *or before they should acquire vested interests* therein, he directed the trustees to convey the shares of those so dying, to the survivors of them and their heirs, in equal shares: but in case any of his children should die *at any time either before or after him*, having issue, then he directed the trustees to convey the shares of those so dying, to the issue whom they should have, in equal shares, and to their respective heirs, on their attaining twenty-one. The testator had several children, all of whom attained twenty one.

Held that their shares of his estates became absolutely vested in them in fee, on their attaining twenty-one.

HENRY WHEABLE, the late father of the Plaintiff, by his will gave and bequeathed all his real and personal estate unto and to the use of trustees, their heirs, executors, &c., upon certain trusts for the benefit of his wife, since deceased, for her life, and, after her decease, in trust to convey and assure, pay and divide the same unto and amongst all and every his children then born or thereafter to be born, in equal shares and proportions as tenants in common, *on their respectively attaining the age of twenty-one years:* and, in case of the death of any or either of them without issue, under that age *or before they, he or she should acquire vested interests or a vested interest therein,* he directed the trustees to convey, assure, pay and divide the part, share, estate and interest, of such child or children so dying, of and in his said real and personal estate, unto and amongst the survivors of his said children and their respective heirs, executors, &c., in equal shares and proportions if more than one, and if but one survivor, then the whole of such part, share, estate and interest to such only survivor, his or her heirs, executors, &c., to and for his and their own use and benefit: but in case any or either of his said children should die *at any time either before or after him*, having issue, then he directed the trustees to convey,

1849.

WHEABLE v. WITHERS.

assure, pay and divide the part or parts, shares or share of them, him or her so dying, of and in his said real and personal estate, unto and amongst the issue whom they he or she should respectively have, in equal shares and proportions, and to their respective heirs, executors, &c., if more than one, and if but one then the whole of each parent's respective share, estate and interest to such only child, his or her heirs, executors, &c., on their or his attaining the age of twenty-one years.

All the testator's children except one (who died an infant shortly after the testator), having attained twenty-one, they made partition of the testator's real estates, and the trustees conveyed to them their respective shares thereof. The Plaintiff, afterwards, contracted to sell his share to the Defendant; and the bill was filed for a specific performance of the contract. The question was whether the Plaintiff was, as the bill alleged, seised of the estate agreed to be sold, for an *absolute, indefeasible* estate of inheritance in fee simple.

The Cause was heard as a short Cause. Mr. *Bethell* and Mr. *J. H. Palmer* appeared for the Plaintiff, and

Mr. *Karslake* for the Defendant. He called the attention of the Court to the direction in the will, in case any of the testator's children should die, at any time either before or after him, having issue, on which the doubt as to the Plaintiff's title arose.

The VICE-CHANCELLOR:

The testator, after making a provision for his wife, directs his trustees to convey and assure, pay, share and divide his real and personal estate unto and amongst all and every his children and child then born or thereafter

to be born, in equal shares and proportions, as tenants in common, on their respectively attaining the age of twenty-one years: which plainly shows that he intended that, if his children attained twenty-one, their shares of his estates should be conveyed to them as tenants in common in fee. Then, in the next sentence, he says: "and in case of the decease of any or either of my said children without issue under the age of twenty-one years, or before they, he or she shall acquire vested interests or a vested interest therein, then I direct my said trustees to convey, assure, pay and divide the part, share, estate and interest of such children or child so dying, of and in my said real and personal estate, unto and amongst the survivors of my said children and their respective heirs, executors, administrators and assigns, in equal shares and proportions." There, when he uses the words: "under the age of twenty-one years," he expresses what he afterwards thinks he has not expressed; and, being under that impression, he adds: "or before they, he or she shall acquire vested interests or a vested interest therein:" which is saying the same thing as he had said before: for nothing was necessary to enable the children to acquire a vested interest, except the attaining of twenty-one. So that he expresses the same thing, though in different words.

Then he says: "but in case any or either of my said children shall die at any time either before or after me, having issue, then and in such case I direct my said trustees to convey, assure, pay, share and divide the part or parts, shares or share of them, him or her so dying, of and in my said real and personal estates, unto and amongst the issue whom they, he or she shall respectively have, in equal shares and proportions, and to their

1849.

WHEABLE v. WITHERS.

respective heirs, executors, administrators and assigns, if more than one, and if but one, then the whole of each parent's respective share, estate and interest to such only child, his or her heirs, executors, administrators or assigns, on their or his attaining the age of twenty-one years." Now, though the testator has not introduced the words: "under the age of twenty-one years," into this last clause; yet I think that those words must, of necessity, be implied: for, as he had before directed the shares of his children to be conveyed to them, *absolutely*, on their attaining twenty-one, the trustees, having executed an absolute conveyance under the first trust, would have nothing left in them which would enable them to execute the last trust as it stands in the will.

My opinion is that the first direction to convey, governs the whole of the will, and takes the share of a child who attained twenty-one, out of the operation of the last trust.

Declare that the Plaintiff, on attaining twenty-one, became entitled to an absolute vested interest in his share of the testator's estates; and, with that declaration, decree a specific performance of the agreement.

THORNTON *v.* KNIGHT.

1849: 15th and 16th February.

Policy of insurance. Delivery up of a written instrument.

Bill filed by the underwriter of a policy of insurance on a ship, to have the policy delivered up, on the ground of deviation and unseaworthiness; but only deviation was proved. Bill dismissed.

THE insurers of a ship having brought an action on the policy, against the underwriter, the latter filed the bill in this Cause, for a discovery in aid of his defence to the action, alleging that the ship had deviated on her voyage, and also that she was unseaworthy when the policy was effected, and praying for an injunction to restrain the action, and that the policy might be delivered up to the underwriter to be cancelled. The injunction was obtained for want of answer, but was dissolved on the answer coming in. At the trial of the action, the underwriter proved the deviation, and obtained a verdict on that ground; but failed in proving unseaworthiness.

The underwriter, relying on the verdict at Law, brought his Cause to a hearing, *without any evidence as to the unseaworthiness of the ship.*

Mr. *Bethell* and Mr. *Hetherington*, in support of that part of the prayer which asked that the policy might be delivered up, relied on *Pearce* v. *Gray* (*a*), and cited also *Simpson* v. *Lord Howden* (*b*) and *Kerr* v. *Rew* (*c*).

Mr. *Stuart* and Mr. *Campbell* appeared for the insurers: but

(*a*) 2 Youn. & Coll. C. C. 322. (*b*) 3 Myl. & Cr. 97.
(*c*) 5 Myl. & Cr. 154.

India &c Assur^ce Co. v Dally 4 Deg. & S. 466. Cooke v Darwin 18 Bear. 61.
Cooper v Joel 1 D. F. & J. 243.

1849.

THORNTON v. KNIGHT.

The VICE-CHANCELLOR, without hearing them, said:

The bill alleges two grounds for the relief which it asks, namely, deviation and unseaworthiness. In support of the former, the Plaintiff relies on the verdict which he has obtained at Law; but he has produced nothing, whatever, in support of the latter.

If the policy, though good on the face of it, had been proved to be void on the ground that the representation made by the insurers, when they effected it, as to the seaworthiness of the ship, was false, I could have interfered; for then a case of fraud would have been made out against the insurers. But I cannot interfere on the mere ground of deviation, unless this Court has a concurrent jurisdiction with a Court of Law, in all cases in which relief is sought against instruments like the one in question. That, however, is not so; and, therefore, I shall dismiss the bill with costs.

DREVER *v.* MAWDESLEY.

1849: 16th, 19th, and 20th February.

Debtor and creditor. Trust for payment of debts.

A. being greatly in debt, he and his father, in pursuance of an arrangement between themselves, conveyed estates of which they were seised for life and in remainder respectively, to trustees in trust to sell for payment of *A.'s* debts; but no creditor was to be entitled to the benefit of the trust, unless the trustees, after having investigated and allowed his debt, should give him a debenture for it. The trustees gave debentures to three of the creditors: after which one of the trustees instituted a suit against his co-trustees, &c., on the hearing of which the *Master* was directed to take an account of *all A.'s* debts due at the date of the conveyance, and to advertise for his creditors to prove their debts by a day to be named or *be excluded from the benefit of the decree.* The Plaintiff and several other creditors of *A.* proved their debts under the decree; but, nevertheless, the Court, on the hearing for further directions, held that none of them except the Plaintiff and the debenture creditors, were entitled to the benefit of the trust.

Richard Legh and his son, *Thomas* being seised, as tenant for life and in remainder respectively, of estates in *Lancashire* and *Cheshire*, and the son having married without making a settlement, and having contracted debts to a large amount, an agreement or arrangement was made between them, in pursuance of which they conveyed part of their estates to *Richard Legh* in fee, another part, which consisted of tithes, to the Plaintiff and the Defendant *Mawdesley* and *Edmund Antrobus* in trust, either immediately or at such time or times as the trustees should think fit, and either before or after any such mortgage or mortgages as thereinafter mentioned should have been made, to sell the same, and, until the whole thereof should be sold, to borrow any sum or sums of money on the security of a mortgage or mortgages of all or any of the tithes remaining unsold, such mortgage or mortgages to be made either with or without a power of sale and upon such terms and conditions and in such manner as the trustees should think proper; and to stand possessed of the monies to arise from such sale or sales, mortgage or mortgages,

Cossen v Radford 1 D. J. & S. 590.

1849.

DREVER v. MAWDESLEY.

upon the trusts, &c., declared concerning the same by an indenture therein referred to, and next hereinafter set forth. *Richard* and *Thomas Legh*, and the trustees, were the only parties to the conveyance of the tithes; and that conveyance was made by deeds of lease and release of the 3rd and 4th of July 1822, and the conveyance to *Richard Legh*, was made by like deeds of the same dates respectively.

By a deed of declaration of trust, of even date with the releases, and made between the same parties as the release of the tithes, after reciting that *Thomas Legh* had contracted various debts and engagements, some for valuable considerations, and others, by way of *post obit, for very inadequate prices and considerations*, and that it was expedient to provide a fund for the payment of his debts, and, at the same time, *to protect him against the exorbitant demands of creditors whose claims were either fraudulent or were not, to the full extent, founded in justice*, and that, for that purpose, it had been agreed that the powers and authorities thereinafter contained should be given to the trustees, and that such trusts should be declared of the trust monies provided for the payment of the debts, as were thereinafter contained; and that certain suits were then depending, and that it might be desirable to institute and defend other suits or actions respecting the right to the tithes comprised in the last-mentioned conveyance, and the exemptions claimed in respect thereof; and that it was, therefore, expedient to make the provisions thereinafter contained in regard thereto: It was witnessed and declared that the Plaintiff and *Mawdesley* and *Antrobus* should have full power and authority, either by themselves or by any persons or person whom they should think proper to appoint for that purpose, *to investigate the nature, extent, origin and*

justness of the several debts and other charges which had been contracted by Thomas Legh *or might be claimed against him or his estate* as having been contracted before the execution of the now stating indenture, *and to proceed, upon such evidence as they should think proper, to allow or to disallow and to pay, liquidate or contest the payment of any such debts, charges or claims,* and also to enter into any contract or agreement, with all or any such creditors or claimants, for compounding, redeeming, reducing or continuing or altering the nature of such debts, charges and claims, or touching or concerning the time or times when, and the manner, order, priority and course in which the same or any of them should be paid, liquidated, settled or discharged; and to ascertain and adjust whether any and what interest should be allowed thereon; and also, *if the trustees should think proper so to do, to cause or procure the said creditors to execute a letter of licence to Thomas Legh* or to covenant not to sue or molest him for their debts or demands, for such time and upon such terms and conditions as might be agreed upon; and also, *if thought advisable by the trustees, to deliver a debenture or debentures, certificate or certificates to the creditors* or any of them, or their or any of their executors, administrators or assigns, for the better securing the performance of the contracts or agreements last mentioned, or evidencing and ascertaining such debt or debts; and such debentures or certificates should be full and conclusive evidence of the right of every person accepting the same, his or her executors, administrators or assigns, to be finally and irrevocably deemed a creditor or creditors to the extent and in manner therein mentioned, and for such interest as should be therein expressed: and also that the trustees should have full power and authority to pay or satisfy the claims of any person or persons who

1849.

DREVER v. MAWDESLEY.

had become sureties for, or had given or should give bail in any action against *Thomas Legh* on account of any such debts; and to enter into any arrangement in regard thereto which the trustees should think proper; and likewise full power and authority, as often as it should appear advisable, to take the opinion of counsel, or to submit the justice or extent of any such claim or demand as aforesaid to arbitration; and, also, from time to time, to bring, institute or defend all such actions or suits respecting the debts and matters aforesaid, or any of them, in the name of *Thomas Legh* or otherwise, and, afterwards, to prosecute or give up or compromise the same or any of them, as to the trustees should seem advisable; and also to constitute and appoint such persons as they should think proper, to act as attorneys, agents or otherwise in and about the affairs of the trust or in anywise relating thereto; and to make such allowances, payments and compensations to such persons respectively, as should be thought reasonable; and to countermand, revoke and discontinue all or any of such appointments and allowances at pleasure; and also full power and authority to do and execute all such acts, deeds, securities, matters and things as should be necessary or advisable for all or any of the purposes aforesaid, or for carrying into effect the trusts of the indenture, as fully and effectually as *Thomas Legh*, his executors, administrators or assigns, could or might have done: And it was thereby further agreed and declared that the trustees should have power and authority to prosecute and carry on or bring to a compromise and arrangement the suits then pending respecting certain parts of the tithes, and, also, (except so far as such compromise might be affected,) to commence and prosecute any new suits or actions, or institute any other proceedings for recovering payment of or settling the extent of the right

to the tithes and the exemptions claimed in respect thereof; and to defend any suits or other proceedings which might be brought against the owner or owners of such tithes, for trying the right to the same, or in anywise relating thereto; and to compromise or to come to any arrangement in any such suits, actions and proceedings or any of them, and act therein, as, to the trustees, should seem advisable and proper; and also full power and authority to appoint such solicitors, attorneys or agents to conduct and manage the said suits, actions and proceedings, and collect and receive the tithes, and to make such allowances, payments and compensations to such persons respectively as should be thought reasonable, and to countermand, revoke and discontinue all such appointments and allowances at pleasure; and, generally, to act in the premises and to do all matters and things relating to the tithes as should be thought advisable by the trustees, and in the same manner as if they were the absolute owners thereof. And it was thereby further agreed and declared that the Plaintiff, and *Mawdesley* and *Antrobus*, should stand possessed of the monies to be raised by any sale, mortgage or other disposition of the tithes, in trust to apply the same in payment of the costs, charges and expenses which should be incurred in respect of the debts of *Thomas Legh*, and in ascertaining and settling the extent of the right to the tithes and the exemptions claimed therefrom, or otherwise in carrying the trusts of now stating indenture into execution, or in respect of any action, suit, deed, matter or thing in anywise relating thereto respectively, and also in payment of the debts and charges already contracted by, or due, owing or claimed from *Thomas Legh*, or such of them or such parts thereof or compositions and interest for the same or any of them, as should be settled or agreed to be

1849.

DREVER v. MAWDESLEY.

paid or fixed by the Plaintiff and *Mawdesley* and *Antrobus*; nevertheless such costs, charges and expenses, and debts and charges of *Thomas Legh*, or compositions or interest in respect thereof, should be paid in such order and course, and with such priority of payment, and out of such of the trust-monies, and in such manner as the trustees should think proper and determine: And, the now stating indenture provided that, as soon as conveniently might be after the execution thereof, the trustees should, if necessary, make such an arrangement or settlement with respect to the debt or debts for which *Thomas Legh* was then or, before his discharge, should be detained in custody, as should enable him to obtain his liberation and discharge, and that he should have a full and fixed right to insist on any arrangement, by the trustees, which might procure his liberation from prison, and all payments necessary to accomplish that object: And further that it should be lawful for the trustees, if they or he, in their or his discretion should think fit, by a charge on the trust-monies and premises, or the tithes or any part or parts thereof, or otherwise as the trustees should think proper, to indemnify the Marshal of the Marshalsea of the King's Bench and the Warden of the Fleet, (in which prison *Thomas Legh* was then detained by his creditors,) for accepting securities for the rules, and all persons who might enter into any bond or engagement on his behalf to enable him to obtain the benefit or privilege of the rules of the said prisons or either of them, while he should be a prisoner in either of them, by reason of any present or future arrest or detainer in respect of a debt or debts already contracted by, or due or owing or claimed from him, and for which he was or might be in custody; and that, when, *Thomas Legh* should be released from his then confinement in prison, it should be lawful for the trustees, if they

should think proper so to do but not otherwise, immediately to pay and advance to him, for his own use, out of the trust-monies, any sum or sums of money which they might think fit, not exceeding 2000*l.*, as an outfit or provision of ready money. And it was thereby provided that, unless or until the trustees should so declare or agree by some writing under their hands, nothing therein contained should give, to any creditor or creditors of *Thomas Legh*, *any specific lien or charge or demand on the trust-monies; but, after a debenture or certificate of debt should be given to any creditor, such creditor, and his or her executors or administrators, should have a right to resort to the trusts thereby created for the payment of debts*, in order that the debt of the same creditor and all interest, if any, might be paid according to the stipulations, true intent and meaning of such debenture or certificate. And it was thereby also provided that, with respect to any debt or debts then due or owing from *Thomas Legh*, and for which no debenture, certificate or specific security should be given in his lifetime, and which, in the opinion of the trustees or their Counsel, should not, before the execution of the now stating indenture, be a charge, lien or incumbrance upon, or enable the person or persons claiming such debt or debts, to affect, either at law or in equity, any real estate of or to which *Thomas Legh* was then seised or entitled, the trusts and provisions therein contained should, after the decease of *Thomas Legh*, absolutely cease and determine, and the trustees should not have any power or authority whatever, after the decease of *Thomas Legh*, to make any payment to or arrangement with any person or persons claiming to be a creditor or creditors in respect of such debts or any of them: And that, during the life of *Thomas Legh*, the trustees should have full power and authority, under the powers

1849.

DREVER v. MAWDESLEY.

and authorities thereby given, to make such arrangements or agreements for the payment or composition of the debt or debts in respect of which the trusts therein contained were to cease after the decease of *Thomas Legh*, as they or he should think proper; and the creditors or creditor who should enter into any such arrangement or agreement, should have all the rights, remedies and benefits to which he or they might thereby become or be entitled, either on the fund therein mentioned and provided, or otherwise, as the case might be, and every such arrangement and agreement should be and continue binding on all the parties and in full force and virtue, as well after the decease as during the life of *Thomas Legh*, in the same manner as if the last proviso had not been inserted: And the now stating indenture further declared that the tithes which should remain unsold after answering the trusts and purposes aforesaid, (and the performance and determination of which the trustees should have power to certify by writing under their hands,) should be settled and assured, by the trustees, to the uses declared, by an indenture of settlement of even date, after the limitation of the term of 100 years created thereby; and that, if any of the trust-monies should remain in hand or not be wanted for the purposes of the now stating indenture, the trustees should invest the same in the purchase of lands in *Cheshire*, and settle the same to the same uses.

By the indenture of settlement referred to in the foregoing deed, *Richard* and *Thomas Legh*, in further performance of the agreement or arrangement between them, limited the remainder of the estates of which they were so seised as aforesaid, to *Richard Legh*, for life, with remainder to the Plaintiff, and *Mawdesley* and *Antrobus*, for the term of 100 years upon the trusts

thereinafter declared, with remainder to *Thomas Legh* for life, with remainder to the intent that his wife might receive a jointure of 1000*l.* *per annum*; with remainder to other trustees for a term of years for raising portions for the younger children of *Thomas Legh* and his wife; with remainder to the Defendant *Richard Banastre Legh*, their eldest son, for life, with remainder to his first and other sons in tail male, with remainder to his first and other daughters in tail, with remainders over, and with the ultimate remainder to *Thomas Legh* in fee. The trusts of the term of 100 years were to permit *Thomas Legh* to reside in the mansion-house rent free, after the decease of *Richard Legh*, until his own decease or until his debts, the payment of which was provided for as therein recited and hereinbefore mentioned, should have been fully paid, which should first happen; to receive the rents of all the estates comprised in the settlement, during the life of *Thomas Legh*, and, thereout, to pay all taxes and other outgoings in respect of those estates, and to keep the buildings thereon in repair and insured against fire; to pay such salaries and wages as the trustees of the term should think proper to allow to stewards, bailiffs, agents or other servants or workmen whom they should employ in superintending and managing the estates; to pay *Thomas Legh* an annuity of 5000*l.* a year, and to stand possessed of the residue of the rents upon the trusts declared by the foregoing indenture. And the settlement empowered certain other persons therein named to raise 10,000*l.* by the sale of timber on the estates and directed those persons to pay one fourth of that sum to the Plaintiff and *Mawdesley* and *Antrobus*, upon the trusts declared of the ultimate residue of the rents to be received by them under the trusts of the term of 100 years: and it empowered *Thomas Legh* to lease the estates and to open mines thereon, but, during

1849.

DREVER v. MAWDESLEY.

the continuance of the trusts of the term, with the consent of the Plaintiff and his co-trustees.

Richard Legh died in August 1822.

In July 1823, the bill was filed by *Drever* against his co-trustees (after he and they had undertaken and acted in the performance of the trusts reposed in them) and against *Thomas Legh* and *Richard Banastre Legh*, his eldest son, and the other persons interested under the limitations of the settlement, and against certain creditors of *Thomas Legh* to whom *Drever* and his co-trustees had given debentures. After stating that the Plaintiff *had always been and was desirous faithfully to perform the trusts which he had undertaken to perform*, and that he was in hopes that his co-trustees would have concurred with him in adopting proper measures for accomplishing the purposes for which he and they were appointed trustees, and in appointing a proper manager or managers of the trust-estates, but they had refused so to do, it prayed that the trusts of the term of 100 years limited by the settlement, and the trusts declared, by the other deeds, of the tithes and of the monies to be produced by mortgage or sale thereof, *might be performed under the direction of the Court;* that an account might be taken of the trust estates, tithes and premises; that the rights and interests of the Defendants, (the debenture creditors,) therein, might be ascertained and declared; that, if necessary, it might be referred, to the *Master*, to appoint a proper person to be a trustee of the said several indentures, in the place of the Defendant *Hopkinson* (who had been appointed in the place of *Antrobus*); that an account might be taken of all sums received, by the Plaintiff's co-trustees, in respect of the rents, income and produce of the trust estates, tithes

and premises, and from the sale of timber thereon, and that what should be found due thereon might be paid into Court to the credit of the Cause, and be applied according to the trusts of the deeds; that it might be referred, to the *Master*, to inquire and state whether certain contracts which had been entered into respecting the trust estates and tithes, had been properly made and ought to be carried into execution; that a manager of those estates, tithes and premises, and a receiver of the rents, profits, income and produce thereof, might be appointed; and that the co-trustees might be restrained from receiving any more of such rents, profits, income and produce; that a receiver of the monies which had arisen from the sale of timber, might be appointed; and *that all proper accounts might be taken, and directions given for carrying the trusts declared by the deeds, into execution.*

By the decree made at the hearing of the Cause in February 1826, the *Master* was directed to take an account of the trust estates, tithes and premises comprised in the term of 100 years limited by the indenture of settlement and in the two indentures or deeds of trust of even date therewith, and of all sums of money received by the Plaintiff and by the Defendants, his co-trustees, in respect of the rents, profits, income or produce of the trust estates, tithes and premises, or otherwise on account thereof; and to ascertain and state whether any and what part of such rents, profits, income or produce, was then outstanding and unreceived, and in whose hands, possession or power; and to take an account of all timber and other trees which had been cut and sold on or from off the trust estates, and of all the sums of money which had been raised thereby or received therefrom, and by whom and at what time or

1849.

DREVER v. MAWDESLEY.

times the same were received, and how the same had been applied, and whether anything and what was due, and from whom, in respect thereof; and whether the timber and other trees which had been so cut and sold, were fit and proper to be cut and sold under the trusts declared, by the indenture of settlement, for raising the sum of 10,000*l.* by sale of timber and other trees, and whether such sales were proper sales; and to inquire and state whether any and what leases or agreements or contracts for leases of the trust estates, tithes and premises, or any and what contracts for the sale of timber, had been made, and by whom, since the execution of the settlement and deeds of trust, and whether such contracts had been properly made and according to the provisions contained in the settlement and deeds of trust; and whether any such, which might not have been made in conformity to the same provisions, were beneficial and such as ought to be carried into execution, and whether it would be proper to cut any other timber for the purpose of raising the 10,000*l.*; and to inquire and state who, since the death of *Richard Legh*, had resided in and occupied the mansion-house and other premises which *Thomas Legh* was to be permitted to reside in and occupy under the trusts of the term of 100 years, and whether the same or any and what part thereof had been let, and to whom, and had been occupied by any and what persons or person other than *Thomas Legh*, and at what rents, and upon what terms, and under what circumstances; and whether anything and what had been received, and by whom, from the rents, issues and profits thereof: and to inquire and state who was then the trustee, in the room of *Edmund Antrobus*, of the estates, tithes, and premises comprised in the term of 100 years and the deeds of trust; and whether such person had been duly appointed such

trustee, and in whom the legal estate in the term of years and the tithes, was then vested; and whether the Defendant *Hopkinson*, had, in any and what manner, acted in the trusts; and whether any and what sum or sums of money had been properly paid or allowed, and by whom, in respect of the taxes and outgoings of the trust estates, and the annuity of 5000*l.* directed to be raised under the trusts of the term. *And the* Master *was ordered to take an account of all the debts due from* Thomas Legh *at the date of the indenture of settlement and deeds of trust, and to compute interest on such of them as carried interest after the rate the same respectively carried, and to ascertain what was due on account thereof respectively*, and to cause advertisements to be published, *for all persons claiming to be creditors of Thomas Legh* at the date of the indenture of settlement and deeds of trust, *to come in before him and prove their debts;* and he was to fix a peremptory day for that purpose, *and such of them as should not come in and prove their debts by the time so to be limited, were to be excluded the benefit of the decree.* The decree further ordered the *Master* to inquire and state whether any and what agreements or debentures had been made or given, and by whom, with or to any and which of the creditors of *Thomas Legh*, according to the powers and trusts of the indentures or otherwise; and whether the same, or any and which of them, had been properly made or given; and whether anything and what had been paid to such creditors, and by whom, and out of what funds, and what remained due to them respectively under or by virtue thereof; and to inquire and state also whether it would be for the benefit of the parties interested in the trust estates, tithes and premises, that any and what proceedings should be taken, commenced and prosecuted for recovering the tithes comprised and mentioned in the

1849.

DREVER v. MAWDESLEY.

deeds of trust, or settling the extent of the right thereto with the exemptions claimed in respect thereof, or for any and which of such purposes, or otherwise in regard thereto. The decree then referred it to the *Master* to appoint some proper person to collect and receive the rents and profits of the trust estates, tithes and premises and the arrears thereof, and directed that the receiver should keep distinct accounts of the rents and profits of the estates and premises comprised in the term of 100 years, and of the rents and produce of the tithes; and that the receiver should be at liberty, out of the rents and profits of the estates and premises comprised in the term, to keep down the annuity of 5000*l.* directed to be paid to *Thomas Legh*, and that the receiver should pass his accounts before the *Master*, and pay his balances into Court, to the credit of the Cause; and that such balances should be laid out in the usual manner.

Thomas Legh died in April 1829.

On the 16th of January 1837, the *Master* made a separate report stating that, in consequence of the advertisements published in obedience to the decree, several persons had come in before him claiming to be creditors of *Thomas Legh* at the date of the settlement and deeds of trust, and that he had set forth the particulars of such debts in a schedule to his report, and that those debts, together with debts of 4000*l.*, 4000*l.*, and 6210*l.* due to three of the Defendants (who were the only creditors to whom the trustees had given debentures) amounted to 202,788*l.* On the 21st of June 1837, the tithes were ordered to be sold with the approbation of the *Master*, and the proceeds to be paid into Court to the credit of the Cause: and, by an order dated the 28th of March

1839, the *Master* was directed *to apportion all the funds in Court to the credit of the Cause, amongst the creditors mentioned in the schedule to the report of the* 16*th of January* 1837, *in proportion to their debts; and it was ordered that what he should so apportion, should be paid to the creditors.*

On the 31st of January 1846, the *Master* reported that, in pursuance of the order of the 28th of March 1839, he had apportioned 10,434*l.* amongst the creditors named in the schedule; that he sold part of the tithes in January 1838, and further parts in May 1843, and January and September 1844, and that all the purchasers, with one or two exceptions, had paid their purchase-monies into Court to the credit of the Cause.

On the 17th of July 1847, the *Master* made his general report; from which it appeared that the 10,434*l.* had been paid to the creditors.

At the hearing of the Cause for further directions,

Mr. *Bethell* and Mr. *Renshaw*, for the Plaintiff, who was one of the *undebentured* creditors named in the schedule to the separate report of the 16th of January 1837, as well as one of the trustees of the deeds of July 1822, contended that the Plaintiff, and *all* the other creditors named in the schedule, were entitled to the benefit of the trusts created, by the deeds, for payment of the debts of *Thomas Legh*. They said that the declaration of trust of the 4th of July 1822, empowered the trustees to investigate the nature, extent, origin and justness of the debts which had been contracted by *Thomas Legh* or might be claimed against him or his estate, and to decide which of those debts

1849.

DREVER v. MAWDESLEY.

and claims ought to be paid and liquidated: but that, by the institution of the suit, those powers were taken away from the trustees and vested in the Court; and the Court had exercised them by directing the *Master* to take an account of *all* the debts due from *Thomas Legh* at the date of the deeds of July 1822, and to publish advertisements for the creditors of *Thomas Legh* to come in before him and prove their debts by a time to be fixed by the *Master*, and, if they should not do so, that they should be excluded from the benefit of the decree; and by ordering, as the Court did on the 28th of March 1839, part of the trust-funds to be applied towards payment of the debts which the *Master* had found due: that, consequently, what remained due to the Plaintiff and the other creditors named in the schedule to the report of January 1837, ought to be paid out of the funds in Court which remained undisposed of. *Wain* v. *Lord Egmont* (*a*).

Mr. *James Parker*, for *Richard Banastre Legh* and the other members of his family, who were entitled, under the declaration of trust, to have the surplus of the funds after paying the debenture creditors, laid out in land to be settled according to the limitations in the settlement in their favour, said that, notwithstanding the institution of the suit and the decree and other proceedings in it, the creditors of *Thomas Legh* to whom the trustees had given debentures, were the only creditors who were entitled to the benefit of the trusts; and, consequently, they alone were entitled to be paid their debts out of the funds in the Cause; that the deeds were made, as the deeds in *Walwyn* v. *Coutts* (*b*) were, for the purpose of carrying

(*a*) 3 Myl. & Keen, 445.

(*b*) 3 Mer. 707, and *ante*, Vol. III., page 14.

into effect a private arrangement made between a father and his son: that they did not confer, upon any of the creditors, a right to call upon the trustees to execute the trusts: that the execution of the deeds did not withdraw, from the creditors, any property which was previously available to the payment of their debts, or deprive them, (nor, indeed, did the decree,) of any remedy which they previously possessed: that no equity founded on dealings with or communications made to the creditors, existed: that the trustees had not refused to act, as the trustees in *Wain* v. *Lord Egmont*, were alleged to have done; but the suit was instituted because they could not agree as to the person who was to have the management of the estates: that *Wain* v. *Egmont* was a stronger case in favour of the rights of the creditors, than the present was; for the property which was made the subject of the deed in that case, was the property of the debtor himself; but nevertheless, the Court held that the decree did not deprive the trustees of the discretion vested in them by the deed; and that no creditor was entitled to the benefit of the decree, until he had submitted his claim to the trustees, and they, in exercise of the discretion vested in them by the deed, had allowed the claim: that the decree in the present case, contained no declaration of right; but merely directed accounts to be taken and inquiries to be made in order to facilitate the execution of the trusts: that the decree did not attempt to confer, upon the *Master*, the discretion given to the trustees; nor did it *decide* that *all* the creditors of *Thomas Legh* were entitled to the benefit of the trusts; as was evident from the inquiries which it directed, as to who were the trustees of the deeds, and whether any agreements or debentures had been made or given to any and which of the creditors; which inquiries would have been use-

1849.

DREVER v. MAWDESLEY.

less if the trustees were to be deprived of all discretion and all the creditors were to be let in: that the order of the 28th of March 1839, was made without argument, and was not binding as an adjudication of the Court upon the point in dispute. *Garrard* v. *Lord Lauderdale* (*c*); 6 Vin. Ab. title *Countermand*, p. 482, pl. 6; *Latouche* v. *Lord Lucan* (*d*).

Mr. *Lloyd*, with Mr. *Parker*, said that the filing of the bill conferred no new or additional right upon the creditors of *Thomas Legh*; and, that being so, it was impossible that the decree could confer any such right; for the decree must be referred back to the bill, on which it rested as its only foundation; and that foundation was rights as they existed at the time when the bill was filed: that it appeared from the recitals in the deed by which the tithes were conveyed to the trustees, that some of *Thomas Legh's* debts, had been contracted for very inadequate considerations, and that some of the claims made upon him, were either fraudulent or were not, to the full extent, founded in justice, and that, in order to protect him against such debts and claims, the trustees were empowered, by the declaration of trust, to investigate the nature, extent, origin and justness of all the demands made upon him or his estate, and to allow or disallow the same, as they should think fit; and to give debentures to those creditors whose claims they should allow: that, after conferring those large, discretionary powers upon the trustees, the deed declared that only those creditors to whom the trustees should give debentures, should have a right to resort to the trusts thereby created for the payment of debts; consequently, no creditor could become a *cestui que trust* under the deed, except through an exercise of the discretion vested

(*c*) *Ante*, Vol. III. page 1. (*d*) 7 Cl. & Fin. 772.

in the trustees: that that discretion was a personal one; and the Court could not take it away from the persons in whom it was vested and transfer it to the *Master*, without contravening the express provisions of the deed, and depriving the authors of it of that protection which they had, so anxiously, provided for themselves: *Cafe* v. *Bent* (*e*); *Walker* v. *Walker* (*f*).

Mr. *Roe*, Mr. *Teed*, Mr. *Hallett*, Mr. *C. Hall*, Mr. *Giffard* and Mr. *Erskine* appeared for other parties.

The VICE-CHANCELLOR:

Nothing has been stated to me in order to account for the decree having been drawn up as we now find it; but I can easily understand that the Counsel for the Plaintiff might be very willing to take any decree which would have the effect of relieving his client from the troublesome nature of the trust in which he found himself involved.

With respect to the deeds themselves, it appears to me, in the first place, that they were revocable, that is, that the father and the son together, if they had pleased, might, immediately after the execution of them, have sold the estates comprised in them, to a purchaser for valuable consideration. For the transaction was nothing more than a settlement of property, to which in different forms and in different ways they were entitled, in a manner agreeable to themselves and for their own purposes. And the very essence of the trust-deed was that, a creditor, in order to entitle himself to the benefit of the trusts declared by it, should submit, to the uncontrolled judgment and discretion of the trustees, not only the amount of his debt, but all the circumstances which attended it; and

(*e*) 3 Hare, 245. (*f*) 5 Madd. 424.

1849.

DREVER v. MAWDESLEY.

also that the trustees should take into consideration, not merely what appertained to the creditor in respect of his debt, but also what was the probable situation of Mr. *Thomas Legh*, in the event of the trustees not making an arrangement satisfactory to the creditors: because the personal liberation of Mr. *Thomas Legh* was a main object both of his father and himself: and it seems to me that it was a trust which this Court could not execute. I do not see how the Court could execute the trust, unless both the father and the son had consented, in some way, that there should be a very different arrangement from that which appears on the face of the deeds.

But, however that may be, there is not one word, in this decree, which amounts to anything like a declaration that the trusts of the deeds ought to be performed, or to an order that they should be performed under the direction of the Court. But the decree does contain a direction that the *Master* should take an account of the debts.

It struck me, at first, that the only circumstance which was in favour of the creditors, was that it might be said that, as the decree, upon the face of it, gave the creditors a benefit, it would be setting very evil example, if the Court held out that it was going to give a benefit to the creditors, and, ultimately, should refuse to give it. But I think that the real answer to that is what was stated by Mr. *Lloyd*, namely, that the parties could have no other benefit under the decree than that which the Court, having regard to the pleadings and the whole of the case, was justified in giving; and that, if there did not appear, independently of the decree, to be any right, on the part of the creditors, to claim the benefit

of the trust-deeds, they could not have it merely because the decree had affected to give it them. But the truth is that the decree, in its terms, has not given them anything. It directs that the *Master* shall take an account of the trust-estates, tithes and premises comprised in the deeds, and of the rents, profits, income and produce thereof; and also of all the debts due from *Thomas Legh* at the date of the deeds, and compute interest on such of them as carried interest; and that he should advertise for all persons claiming to be creditors of *Thomas Legh*, to come in before him and prove their debts, and fix a peremptory day for that purpose, and that those who should not come in and prove their debts by the time so to be limited, should be excluded the benefit of the decree: but what benefit the decree gives them, I am unable to conceive.

And therefore the case stands thus: that the father and the son might have destroyed the trust-deeds; but they did not; they allowed them to stand as they were made. But the Court has not taken upon itself to execute the trusts of the deeds, though it has given a direction for the purpose of ascertaining who the general creditors of the father and son were. The consequence, therefore, is that, as far as the creditors are concerned, except those who have been found to be debenture-creditors, and excepting Mr. *Drever*, the Plaintiff, who stands in the situation of a trustee with the fund in his hand which you cannot very well take from him until you have satisfied his debt, no relief in this Cause can be administered.

Declare that the amount due to the Defendants, the

1849.

DREVER v. MAWDESLEY.

debenture-creditors, and the amount reported due to the Plaintiff, ought to be paid out of the funds and property subject to the trusts of the indenture of declaration of trust of the 4th day of July 1822: refer it back to the *Master* to ascertain what is now due for principal and interest in respect of the said debenture-debts: order the *Master* to ascertain what is now due to the Plaintiff, for principal and interest in respect of the debt by the *Master's* report found to be due to him: order so much of the 65,841*l.* Consols standing in the name of the *Accountant-General* in trust in the Cause, "The Tithe Account," as will be sufficient to raise the amount reported due to the debenture-creditors and the Plaintiff, to be sold; and order that, out of the money to arise by such sale, the amounts which shall be reported due to the debenture-creditors and the Plaintiff, be paid to them: declare that, according to the true construction of the several deeds of trust of the 4th day of July 1822 and in the events which have happened, the surplus tithes, monies, stocks, funds, securities and estates therein comprised and the trusts whereof are thereby declared, remaining after the satisfaction of the debts hereinbefore provided for, are held upon the trusts by the indenture or deed of trust of the 4th of July 1822 declared concerning the tithes which should remain unsold after answering the trusts and purposes of that indenture, or the trust-monies, stocks, funds and securities which should remain in hand or not be wanted for the purposes of that indenture: declare that the Defendant *Richard Banastre Legh*, the tenant for life under the trusts of the said indenture, is entitled to the annual produce of the tithes which have accrued since the 25th day of April 1829 (the day of his father's death) after deducting, thereout, the interest which, since that time, has been payable in respect of the debts

hereinbefore provided for: and refer it, to the *Master*, to take an account of what is due to the said Defendant *Richard Banastre Legh*, having regard to the declaration aforesaid.

1849.

DREVER v. MAWDESLEY.

MYERS *v.* PERIGAL.

1849: 20th and 21st February.

Railway debenture. Shares in a joint-stock bank. Charity. Mortmain.

THE testator in this Cause died in February 1845, having, by his will dated in June 1844, bequeathed his residuary personal estate to trustees in trust for certain charitable societies.

The decree in the Cause directed the *Master* to take an account of the testator's personal estate possessed by the Defendants, his executors; to distinguish what part of it (if any) consisted of money due on mortgages, or of railway-debentures, shares in bridges, or of chattels real or otherwise savouring of the realty; and to inquire and state whether the testator had standing in his name at his death, any and what shares in the *Durham* and *Northumberland* District Bank: and the decree ordered that such inquiries should be without prejudice to any question on the Statutes of Mortmain.

A debenture of the *Newcastle* and *Carlisle* railway company, held not to be within the Statute of Mortmain.

Shares in a joint-stock bank, the property of which consisted of freehold and copyhold estates and mortgages for terms of years, held to be within the Statute of Mortmain.

The *Master* found that the testator was, at his death, possessed of 1200*l.* due on a mortgage of certain leasehold tenements: a debenture of the *Newcastle* and *Carlisle* Railway Company for 600*l.*: a debenture upon the tolls of *Morpeth-bridge*, for the like sum: and that the testator was also, at his death, possessed of the following chattels real, namely, six hundred shares in the *Durham* and *Northumberland* District Bank, the property of

1849.

MYERS v. PERIGAL.

which consisted, amongst other things, of freehold and copyhold hereditaments, and money due on mortgage of freehold, copyhold and leasehold hereditaments; and that the aforesaid mortgage for 1200*l.*, railway-debenture, bridge-debenture and bank-shares were all chattels real or savouring of the realty, except as far as the bank-shares and railway-debenture were respectively altered or varied in respect of their nature or quality of such chattels real as aforesaid (if they were, at all, so altered or varied) by a certain deed of settlement dated the 1st of July 1836, whereby the shares in the bank were declared to be personal estate, and by an Act of Parliament of the 13th of April 1839, whereby *the shares* in the railway were declared to be personal estate.

The Act of Parliament referred to by the *Master*, was the Act passed for making the railway. The 61st section of it empowered the railway company, in case the sum of 300,000*l.* thereby authorized to be raised, should be found insufficient for the purposes of the undertaking, to borrow, from time to time, any further or additional sum or sums, not exceeding, in the whole, 100,000*l.* on the credit of the undertaking, *and to assign the property of the undertaking and the rates arising or to arise by virtue of the Act*, or any part thereof, as a security for any such further or other sum or sums of money to be borrowed as aforesaid, with interest, to such person or persons as should advance the same, by any assignment under the common seal of the company, in the words or to the effect following, that is to say: "By virtue of an Act passed in the tenth year of the reign of his Majesty King *George* the Fourth, intituled, &c., we the company of proprietors of the *Newcastle-upon-Tyne* and *Carlisle* Railway, incorporated by and under the said Act, in consideration of the sum of *l.* to us in hand paid by

of do assign unto the said his executors, &c., *the said undertaking and all and singular the rates, tolls and profits arising by virtue of the said Act*, and all the estate, &c., of the said company in and to the same, to hold unto the said his executors, &c., until the said sum of *l.* together with interest for the same after the rate of *l.* for every 100*l.* by the year, shall be fully paid and satisfied."

The 62nd sect. enacted that the interest of the money which should be raised by mortgage as aforesaid, should be paid, half-yearly, to the several persons entitled thereto; and, in case the same or any part thereof should be behind and unpaid for the time therein specified, *that it should be lawful for two or more justices of the peace acting in and for the counties therein named, and they were thereby required, on request to them made by or on behalf of any mortgagee or mortgagees whose interest should be so in arrear, by an order under their hands, to appoint one or more person or persons to receive the whole or such part or parts of the said rates as were liable to pay the interest so due and unpaid as aforesaid;* and the money so to be received by such person or persons, was thereby declared to be so much money received by or to the use of such person or persons to whom such interest should be then due, until the same, together with the costs and charges of recovering and receiving the rates, should be fully satisfied and paid; and, after such interest and costs should have been paid and satisfied, that the power and authority of such receiver and receivers for the purposes aforesaid, should cease and determine.

In the 1st of Vict. the railway company obtained an Act to authorize them to raise an additional sum of 300,000*l.*

1849.

MYERS v. PERIGAL.

The 1st section of it recited the Act of the 10th Geo. IV. and other Acts which the company had obtained. The 2nd section enacted that when and as soon as the 300,000*l.* should have been subscribed, and 150,000*l.* part of it should have been raised and paid by means of the additional shares thereby authorized to be created, then and at any time or times thereafter, it should be lawful for the company to borrow and take up at interest, in addition to the sums by the recited Acts authorized to be raised and borrowed, and the sum thereby authorized to be raised by the creation of additional shares, any sum or sums of money not exceeding, in the whole, the sum of 100,000*l.*, *on the credit of the undertaking*, from any person or persons willing to lend the same, upon such terms, as to priority of ranking amongst the persons lending such sum or sums of money, as might be agreed on between them and the company; so always, nevertheless, that all mortgages which should have been given or made by the company before the passing of that Act, should have priority over and should precede all mortgages *and other securities* to be given or made by the company in the execution of that Act. The 3rd section enacted *that all powers and other clauses whatsoever contained in the recited Acts or any of them*, so far as the same were not repugnant to the provisions of that Act, *should be applicable* to the shares by that Act authorized to be created and to the monies subscribed for in respect of such shares, and *to the monies by that Act authorized to be borrowed, in the same manner, in all respects*, as near as might be, as if such shares had been authorized to be created, and *as if such monies had been authorized to be borrowed* by the recited Acts.

The debenture of the railway company, held by the

1849.

MYERS v. PERIGAL.

testator, was signed by seven of the directors on behalf of the company, and was as follows: "In pursuance of an Act of Parliament made and passed in the first year of the reign of her Majesty Queen Victoria, intituled 'An Act to authorize the *Newcastle-upon-Tyne* and *Carlisle* Railway Company to raise an additional Sum of Money for the Purposes of their Undertaking, the *Newcastle-upon-Tyne* and *Carlisle* Railway Company promise to pay, on the 23rd day of March 1847, to *John Stevenson*, Esq., or bearer, the sum of 600*l.*, so much money borrowed on the credit of the undertaking under the powers of the said Act, together with interest thereon at the rate of 5*l. per cent. per annum.*"

The bridge debenture was signed by five of the commissioners appointed under the Act of Parliament for building the bridge, and it authorized the treasurer to the commissioners for the time being, *by and out of the tolls* then and thereafter to be received at the bridge, to repay, to the testator, his executors, &c., the sum of 600*l.*, with interest at 5*l. per cent. per annum* from the date thereof, when and so soon as the treasurer should be enabled so to do, by and out of the tolls, according to the directions of the last-mentioned Act.

On the Cause coming on to be heard for further directions,

Mr. *Stuart* and Mr. *Faber*, for the widow of the testator, and Mr. *Renshaw*, for his next of kin, cited *Knapp* v. *Williams* (*a*) and *Howse* v. *Chapman* (*b*) as authorities that the bridge debenture was within the

(*a*) 4 Ves. 430, note. (*b*) Ibid. 542.

1849.

MYERS v. PERIGAL.

Statute of Mortmain; and *Finch* v. *Squire* (*c*), as an authority that the railway debenture (which, they said, was very different from *a share* in the railway and, therefore, was not affected, as to its nature or quality, by the Act of the 10th Geo. IV.) was within the same statute.

With respect to the shares in the bank, they said that the banking company was not a corporation; that every shareholder was interested in the property of the company, and that its property consisted of freehold and copyhold estates and chattels real; and, consequently, the testator's shares in the bank were within the statute.

Mr. *Teed* and Mr. *Hughes* appeared for the executors.

Mr. *James Parker* and Mr. *Wetherell* appeared for the charitable societies. They admitted that the bridge debenture was within the statute, but contended that the bank shares and the railway debenture were not: for the bank was a joint-stock bank established pursuant to 7 Geo. IV. c. 46 (for regulating copartnerships of certain bankers in *England*, &c.); the shares in it were declared to be personal estate by its deed of settlement; and a shareholder had only an interest in the profits of the concern, and could not lay his hand upon any part of the property belonging to it, and say it was his: *March* v. *The Attorney-General* (*d*), *The Attorney-General* v. *Giles* (*e*), *Thompson* v. *Thomp-*

(*c*) 10 Ves. 41.
(*d*) 5 Beav. 433.
(*e*) Ibid. 436, cited, and reported in 5 Law Journ. New Series.

son (*f*), *Hilton* v. *Giraud* (*g*), and *Sparling* v. *Parker* (*h*).

The *Vice-Chancellor.*—In *Thompson* v. *Thompson* the shares in the gas-light and coke company, were expressly declared, by the Act of Parliament by which the company was incorporated, to be personal estate; and, in *Hilton* v. *Giraud*, the capital of the *London* Dock Company was declared, in like manner, to be personal estate. In the present case, the shares in the bank are declared to be personal estate by the deed of settlement; but that is nothing more than an agreement between the partners themselves.

Argument for the Charities, resumed.—With respect to the railway debenture, *that* was a security given under the Act of the 1st of Vict.—The Act of the 10th of Geo. IV., by which the railway company was incorporated, enabled the company to raise money by mortgage of the property or rates of the undertaking; but the Act of Victoria did not *prescribe* that mode of raising money: it authorized the company to raise it in any way they could; and the company have found persons willing to lend them money on instruments called debentures, but which, in fact, are nothing more than promissory notes of the company: they neither give the holders, nor enable them to acquire any interest in land; they confer nothing more than a claim, enforceable by action, against the company. We submit therefore that the *Master* has come to a wrong conclusion with respect to the railway debenture, as well as with respect to the bank shares.

(*f*) 1 Coll. 381. (*g*) 1 De Gex & Smale, 183.
(*h*) 9 Beav. 450.

1849.

MYERS v. PERIGAL.

Mr. *Faber*, in reply.

The case of *Sparling* v. *Parker* does not apply to the bank shares. There the company was a body corporate; which makes all the difference. The banking company, in this case, is a mere copartnership; and every individual shareholder has an interest in the real estates and chattels real belonging to it.

The *Vice-Chancellor*.—I will not trouble you with respect to the bank shares; for it seems to me that they are, necessarily, chattels real. I should have thought that *Sparling* v. *Parker* was a perfectly plain case. What do you say to the railway debenture?

Mr. *Faber*.—By the 62nd sect. of the 10th Geo. IV. the rates of the railway company are made available to the payment of the interest of the money borrowed under that Act; and the 3rd sect. of the Act of the 1st of Vict. enacts that all powers and clauses contained in the former Act shall be applicable to the monies authorized to be borrowed by the latter: therefore, the interest of the money secured by the debenture, is payable out of the rates: *Knapp* v. *Williams*.

The *Vice-Chancellor*.—In that case the very tolls of the turnpike road, were assigned to the lender of the money.

Mr. *Faber*.—It matters not whether the tolls or rates are expressly assigned or not. If they are a security for the money, a charity cannot claim it: *Collinson* v. *Pater* (*i*). In that case a mere judgment-debt was held to be within the statute.

(*i*) 2 Russ. & Myl. 344.

1849.

MYERS v. PERIGAL.

The VICE-CHANCELLOR:

As I have already expressed it to be my opinion that the bank shares are within the Statute of Mortmain, and as the Counsel for the charitable societies have admitted that they could not claim the bridge debenture, the only question that I have to decide, is whether the railway debenture is within the statute: and my opinion is that it is not.

The Act of the 1st of Vict. authorizes the railway company to borrow money on the credit of their undertaking: and it provides that all mortgages which shall have been made, by the company, prior to the passing of the Act, shall have priority over all mortgages and other securities to be given or made, by the company, in the execution of the Act. Then the third sect. enacts that all powers and other clauses contained in the recited Acts, or any of them, shall be applicable to the shares by that Act authorized to be created, and to the monies subscribed for in respect of such shares, and to the monies by that Act authorized to be borrowed, in the same manner, in all respects, as near as may be, as if such shares had been authorized to be created, and as if such monies had been authorized to be borrowed by the recited Acts. But the Act of the 10th of Geo. IV., which is one of the recited Acts, gives something very different from a general charge on the rates. The 62nd section of that Act, after directing that the interest of the money which should be raised by mortgage, should be paid half-yearly, says that, in case the same or any part of it shall be behind and unpaid for the space of twenty-one days, and shall not be paid within seven days after demand thereof, two or more justices of the peace, on request to them made by or on behalf of any mortgagee whose interest shall be so in arrear,

1849.

MYERS v. PERIGAL.

shall appoint one or more person or persons to receive the whole or such part or parts of the said rates as are liable to pay such interest so due and unpaid as aforesaid. The language, you will observe, is, to receive the whole or such part or parts of the said rates as are liable to pay the interest. But, by the debenture in question, the rates are not made liable at all. It contains nothing that amounts either to an assignment of the rates, or to a declaration that they shall be liable. It amounts to nothing more than a promise to pay 600*l.*, so much money borrowed on the credit of the undertaking. Therefore it cannot give the holder whose interest is in arrear, any right to apply to the justices of the peace, under the 62nd sect. of the Act of Geo. IV., to appoint a receiver of the rates. That section seems applicable only to a case in which, by means of an instrument which a creditor holds in his hands, the rates are made liable to pay the interest. But even supposing that view not to be the correct one, it is only a mode of using an instrument which a person holds in his hands. An ordinary promissory note may be made, in a circuitous way, to affect the land of the party liable to pay the money due on it; because the holder may obtain a judgment in an action against the drawer, and may then take his land in execution; but no one would call such a security a charge on the land.

My opinion, therefore, is that this railway debenture is not a charge upon land, and does not come within the Statute of Mortmain.

SHELTON *v.* WATSON.

1849: 26th February.

Executory trust. Will. Construction.

Testator directed an estate to be purchased with his residuary personal estate, and made hereditary and settled upon his there constituted heir and then to *descend* to his heirs, or, dying without issue, as he should then provide for. The testator then constituted his nephew *W. S.* his heir and successor, and directed the estate, when purchased, to be *settled on* W. S. *his heirs and successors in the direct male line,* lawfully begotten and born in wedlock; and in case *W. S.* should die without issue, the estate to devolve to his brother *F. S.*, his heirs and successors, lawfully begotten and born in wedlock in the direct male line. The testator then declared that his object, intent, desire and command was *that the estate should never pass out of his family, and that no person should hold it under any other name than the one he bore of* Shelton.

The Court directed the estate to be settled on *W. S. for life,* with remainder to his first and other sons in tail male; with remainders to *F. S.* for life and to his first and other sons, in tail male.

THE will of *John Shelton*, the testator in this Cause, was, partly, as follows: "My desire and commands are that a landed estate shall be purchased, as soon as practicable, to the full amount of my property, deducting only 1000*l.*, which I bequeath to my god-daughter Miss *Fanny Codd;* and that such, the said estate, shall then *be made hereditary and settled upon* my constituted heir. To avoid the chicanery of law, I will explain myself further, in order that my meaning and intentions may be plain, and not be thwarted and rendered nugatory by law technicalities or the want of them. My wish and desire are that my executors should, with the monies I have, purchase, to the best advantage, an estate which is to be *made hereditary and settled upon* my here constituted heir, *and to descend to his heirs*, or, dying without issue, as I shall now provide for. I hereby constitute, nominate and appoint my nephew, *William Shelton*, my heir and successor; and the said estate, when purchased, is to be settled on him, *his heirs and successors, in the direct male line* lawfully begotten and born in wedlock. In case my said nephew, *William*, die without issue, the

1849.

SHELTON v. WATSON.

said estate to devolve to his brother, *Frederick Shelton*, his heirs and successors, lawfully begotten and born in wedlock, in the direct male line; and, in case of his also dying without issue, the said estate then to devolve upon his brother, *John Shelton*, his heirs and successors, lawfully begotten and born in wedlock, in the direct male line; but, in the event of his dying also without issue, the said estate then to devolve upon my next heir and successor in the eye of the law, and to his heirs and successors in perpetuity; *my object, intent, desire and command being that the said estate shall never pass out of my family, and that no person shall hold it under any other name than the one I bear of* Shelton. In confirmation of the above being the full extent of my wishes and desire, I here underneath affix my signature."

The bill was filed by *William Shelton*: and the question at the hearing of the Cause, was whether the estate, directed by the testator to be purchased, ought, as the Plaintiff contended, to be limited to the Plaintiff in tail, or, as the Defendants contended, to the Plaintiff for life, with remainder to his first and other sons, in tail male, with remainders to his brothers *Frederick* and *John*, successively, for life, and to their first and other sons, in tail male, with remainder to the testator's right heirs.

Mr. *Rolt* and Mr. *Osborne*, for the Plaintiff, said that this case was distinguishable from *Papillon* v. *Voice* (*a*), and *Leonard* v. *The Earl of Sussex* (*b*); because, in the former of those cases, the testator had directed the estate to be settled on the first taker *for life*, and, in the latter, that it should not be in the power of the first taker to dock the entail: but the testator, in the

(*a*) 2 P. W. 471. (*b*) 2 Vern. 526.

present case, had not only given no such directions, but had directed, in the most peremptory language, that the estate should be made *hereditary* and settled upon the Plaintiff, his constituted heir, and *descend* to his heirs; and, therefore, the Court could not direct the estate to be limited to the Plaintiff for life only, for, then the estate would not be made hereditary in him, nor would it *descend* to his heirs; but they would take it as purchasers; *Seale* v. *Seale* (*c*), *Blackburn* v. *Stables* (*d*), *Britton* v. *Twining* (*e*) and *Jervoise* v. *The Duke of Northumberland* (*f*), where copyholds were devised to *Ralph William Grey*, to be entailed on his male heirs, and, failing such, to pass to his next brother, and so on from brother to brother; and, though Lord *Eldon* did not decide what estate *Ralph William Grey* took, yet it was pretty clear that his Lordship was of opinion that he did not take a mere estate for life.

Mr. *K. Parker* and Mr. *Roundell Palmer*, appeared for *Frederick* and *John Shelton*, and

Mr. *Bacon* and Mr. *Hetherington*, for the trustees of the will: but

The VICE-CHANCELLOR, without hearing them, said:

No one can read this will through, without seeing that the testator did not know the exact meaning of some of the words which he has used.

He first directs that an estate shall be purchased, and be made hereditary and settled upon his constituted heir. Afterwards he directs the estate to be made

(*c*) 1 P. W. 290.
(*d*) 2 Ves. & Beam. 367.
(*e*) 3 Mer. 176; see Judgment.
(*f*) 1 Jac. & Walk. 559.

1849.

SHELTON v. WATSON.

hereditary and settled on his there constituted heir, and to descend to his heirs. He next constitutes his nephew, *William*, his heir and successor, and directs that the estate shall be settled on him, his heirs and successors, in the direct male line, lawfully begotten and born in wedlock. But it is perfectly plain that the testator did not mean that such a disposition should be made of the estate as would give his nephew, *William*, the absolute interest in it, or enable him to acquire that interest, and, thereby, prevent it from going over to the other persons named in his will. For he says: "In case my said nephew, *William*, die without issue, the said estate to devolve to his brother, *Frederick Shelton*, his heirs and successors, lawfully begotten and born in wedlock, in the direct male line: and, in case of his also dying without issue, the said estate then to devolve upon his brother, *John Shelton*, his heirs and successors, lawfully begotten and born in wedlock, in the direct male line." And then come these important, overruling words: "My object, intent, desire and command being that the said estate shall never pass out of my family, and that no person shall hold it under any other name than the one I bear of *Shelton*." Taking then the whole of the will together, it seems to me that the only way to effectuate the testator's intention, is to direct a settlement to be made which will give the estate to the testator's nephew, *William*, for life, with remainder to his first and other sons in tail male, with remainders to his brothers, *Frederick* and *John* and their first and other sons in like manner (*g*).

Declare that, according to the true construction of the will of *John Shelton*, the testator in the pleadings

(*g*) See *White* v. *Carter*, 2 Eden, 366.

1849.

SHELTON v. WATSON.

named, his residuary estate ought to be invested in the purchase of real estates according to the directions of the said testator's will, and that such real estates, when purchased, ought, according to the trusts of the said will, to be conveyed and settled to uses in favour of the Plaintiff and his issue male in strict settlement, with remainder to the like uses in favour of the defendant *Frederick Shelton* and his issue male, with remainder to the like uses in favour of the Defendant *John Shelton* and his issue male, with the ultimate remainder as in the said will mentioned.

Reg. Lib. B. 1848, fo. 686.

WORTHINGTON *v.* MORGAN.

1849: 26th February.

Mortgage. Priority. Notice.

A. agreed to sell an estate to B., for 1400l., of which 400l. was to be paid on the execution of the conveyance, and 1000l. was to be secured on mortgage of the estate. B. paid A. the 400l., and A conveyed the estate to him; but kept possession of the conveyance and of the title-deeds. Some time afterwards B. mortgaged the estate to A. for the 1000l.; but, in the interim, he had, unknown to A., mortgaged the estate to C.; but C. did not investigate the title to the estate or make any inquiry relative to the title-deeds.

Held that A. was entitled to priority over C.

A. DUNCAN, Esq. died in July 1839, having, in February of that year, agreed to sell a messuage and garden in *Worcester*, to *J. F. Corbett*, for 1400*l.*, of which 400*l.* was to be paid on the 24th of June then next, when the purchase was to be completed, and the remainder was to be secured by a mortgage of the premises agreed to be sold.

In August 1840, the Plaintiffs, who were the executors and trustees of *Duncan's* will, conveyed the pre-

Vol. XVI.

1849.

WORTHINGTON v. MORGAN.

mises to *Corbett*, in pursuance of the agreement; and *Corbett* paid them 400*l.* in part of the purchase-money; but they did not deliver, to him, either the conveyance or the title-deeds of the premises. *Corbett* having neglected to execute a mortgage, to the Plaintiffs, for the remainder of the purchase-money, they filed a bill, in June 1842, to compel him so to do; and, in March following, they obtained a decree; in obedience to which he executed the mortgage in August following. In the mean time, however, that is to say, in April 1842, he, as the Plaintiffs discovered about two years afterwards, had mortgaged the premises, to the Defendant, *Morgan*, for 400*l.*

In November 1847, the bill in this Cause was filed, charging that *Morgan* claimed priority, in respect of his mortgage, over the charge, lien or mortgage of the Plaintiffs; but that, *Morgan*, previously to and at the time of the execution of his mortgage, had notice, either actual or constructive, of the terms on which *Corbett* had purchased the premises, and that 1000*l.*, part of the purchase-money, remained unpaid and due on the security of the premises: that *Morgan* did not, nor did any person on his behalf, investigate the title to the premises *or require to see the title-deeds thereof, or ever see or inspect the conveyance of the premises from the Plaintiffs to Corbett*; and that, previously to and at the time when the mortgage was made to him, he well knew that the title-deeds and the conveyance, were in the possession of the Plaintiffs, and that they had never been delivered to *Corbett*. The bill then alleged that *Corbett* became bankrupt in May 1846, and that, in August 1847, his assignees, being satisfied that the premises were not worth the sum of 1302*l.*, which was then due to the Plaintiffs on the security of their mortgage, released the

equity of redemption of the premises, to the Plaintiffs, in consideration of that sum. The bill prayed that an account might be taken of what was due, to the Plaintiffs, on their mortgage, or for so much of the purchase-money of the premises as remained unpaid; and that *Morgan* might pay the Plaintiffs what should be found due on taking that account; *they, in that case, offering to waive, in his favour, the release of the equity of redemption*; and that, in default of such payment, *Morgan* might be foreclosed of all right and equity of redemption in the premises.

Morgan, by his answer, admitted that neither he nor any person on his behalf, investigated the title to the premises, *or required to see the title-deeds thereof, or see or inspect the conveyance to Corbett;* but he denied that he knew, when the mortgage was made to him, that the title-deeds and the conveyance, were in the possession of the Plaintiffs, and that they had never been delivered to *Corbett*; or that he was aware of the terms on which *Corbett* had purchased the premises, or that any part of the purchase-money remained unpaid. The answer further stated that, if all the estate, right and interest, of *Corbett* and his assignees, in the premises, had become vested in the Plaintiffs, their alleged security had become merged, and they had become and were, with respect to the Defendant, in the position of mortgagors; the Defendant being a mortgagee *having the legal estate;* by reason whereof, he insisted that the Plaintiffs were not entitled to the relief prayed by their bill: and he claimed the same benefit of that defence, as if he had demurred to the bill.

Mr. *Bethell* and Mr. *Archibald Smith*, for the Plain-

1849.

WORTHINGTON v. MORGAN.

tiffs, cited *Dryden* v. *Frost* (*a*), which they said very nearly resembled the present case. They referred also to *Thompson* v. *Kendall* (*b*), *Mocatta* v. *Murgatroyd* (*c*), *Greswold* v. *Marsham* (*d*), and *Forbes* v. *Moffatt* (*e*), in order to show that the Plaintiffs had not merged their charge by taking a conveyance of the equity of redemption of the premises.

Mr. *Stuart* and Mr. *Martindale*, for the Defendant, said that the mere omission, on the part of their client, to call for the title-deeds, was not sufficient to postpone his security to the security taken by the Plaintiffs: and they relied on their client having taken his security without notice of the Plaintiffs' claim, and on his having got the legal estate in the premises: *Allen* v. *Knight* (*f*).

The VICE-CHANCELLOR:

I entirely acquiesce in what was said, by the *Lord Chancellor*, in *Allen* v. *Knight*; but this case is quite different from that.

Here the house and garden were sold, by *Duncan* to *Corbett*, in 1839; and, *Duncan* having died before the sale was completed, the trustees of his will conveyed the house and garden to *Corbett*; but, as they received only part of the purchase-money, they kept possession of the conveyance and of the title-deeds. In 1842, *Corbett* mortgaged the tenements to *Morgan*, (who, evidently, was not much skilled in the

(*a*) 3 Myl. & Cr. 670.
(*b*) *Ante*, Vol. IX. page 397.
(*c*) 1 P. W. 393, see 395.
(*d*) 2 Chan. Ca. 170.
(*e*) 18 Ves. 384.
(*f*) 5 Hare, 272; and, on appeal, 16 Law Journ. N. S. 370; and 11 Jurist, 527.

law of real property,) and he omitted to ask for the deeds.

Now, in this country, the title to chattels, as was observed by Lord *Eldon*, is evidenced by possession; but the title to land, is evidenced by written instruments. Therefore, it was the duty of *Morgan*, before he took his mortgage, to ask for the deeds; and, if he had asked for them, he would have learnt that they were in the possession of persons who claimed a lien or charge, upon the tenements, for unpaid purchase-money. And I think that he must be taken to have had notice of those circumstances which, if he had not neglected his duty, would have come to his knowledge.

Therefore I shall declare that the lien of the Plaintiffs is unaffected by *Morgan's* mortgage, and that the Plaintiffs are the first incumbrancers on the tenements; and I shall make a decree, for a foreclosure, against *Morgan*.*

Reg. Lib. B. 1848, fo. 686 b.

* There was nothing special in the decree: it directed the Plaintiffs to convey the mortgaged premises to the Defendant, on his paying them their principal, interest and costs, within six months after the *Master* should have made his report; and, on the Defendant making default therein, that he should be foreclosed.

In re Golden 1 D. M. Gg. 56. In re Barton's Trusts 10 Hare 12. Southouse v Bate 16 Beav. 133. Holmes v Godson 8 D. M. Gg. 155. 166 Henderson v Cross 29 Beav. 218.

1849: 27th February and 1st March.

Will. Construction.

Testator gave the residue of his personal estate to trustees in trust for his wife for life, and after her death, to his daughter, who was an infant at his death: "the same to be always considered as vested in her upon her attaining twenty-one, and to be subject to her disposition thereof;" and, by a subsequent clause, the testator gave the property over, in case his daughter should die under twenty-one, *or without disposing of the property by her will.*

Held that the daughter was entitled to the property, not absolutely, but only for life with a power to dispose of it by will.

BORTON *v.* BORTON.

JOHN REPTON, Esq. made his will dated the 27th of May 1809; and thereby, after appointing *William Lubbock*, *James Marsh*, and his nephew, *William Repton*, the executors thereof, and, together with *Elizabeth* his wife, the guardians of his daughter, *Elizabeth*, during her minority, he expressed himself thus:

"I authorize, empower and direct my said executors or the survivor of them, his executors or administrators, as soon as convenient can be after my decease or they shall think fit, to sell and dispose of, either by public auction or private contract as they shall deem most advisable, all and every my messuages, lands, tenements, hereditaments and real estate whether freehold or copyhold or of any other tenure and wheresoever being, for the best price and most money that can be obtained for the same; and to receive the rents thereof until the

---

Chose in action. Marriage articles. Husband and wife.

A lady married before she attained twenty-one, and, by her marriage articles, she and her husband covenanted to assign a trust fund, in which she had a reversionary interest, to trustees in trust for her and her husband and the children of their marriage. A bill, for a specific performance of the articles, filed, by the children, against their father and mother, after the mother's interest had become an interest in possession, but whilst the fund remained outstanding, was dismissed.

1849.

BORTON v. BORTON.

same shall be sold: the money arising from such sale or sales and from the rents thereof in the mean time, I desire may be added to and considered as part of my personal estate, and be subject to the disposition hereinafter made thereof. Item, I authorize, empower and direct my said executors or the survivor of them, his executors or administrators, to manage, conduct and carry on the farm I now occupy under the Right Honourable Lord Viscount *Anson*, during the remainder of the said lease I hold thereof; and to renew the same at the expiration thereof, if such renewal can be obtained and they, in their discretion, shall deem it advisable: for which purpose I give to them, my said executors, or the survivor of them, his executors or administrators, all the stock, crop, implements and effects whatsoever in, upon or belonging to the said farm and premises (except my household furniture and household effects, all which I give to the said *Elizabeth*, my wife, for her absolute use) upon this special trust, nevertheless, that they, my said executors, or the survivor of them, his executors or administrators, shall and do, yearly, pay and apply the clear gains and profits arising from carrying on the said farm and from the said stock, crop and effects, in and towards the comfortable support of the said *Elizabeth*, my wife, and the maintenance, education and bringing up of the said *Elizabeth*, my daughter, until the latter attains the age of twenty-one years; the overplus of such yearly profits to be added to my personal estate and to be subject to the provisions after mentioned. And I also direct my said executors or the survivor of them, his executors or administrators, to collect and receive all such sum and sums of money as may be due to me from any person or persons whomsoever, or upon any account whatsoever, whether the same arises under the will of my late father deceased or otherwise. The money to be

1849.

BORTON v. BORTON.

received from the sale of my said real estate, from the rents thereof in the mean time, from the profits arising from carrying on the said farm, or to be received as last mentioned, I direct my said executors or the survivor of them, his executors or administrators, to place out at interest on good real or government security, and to continue the same on like security, together with such other sum or sums of money as I may have already invested therein; with liberty to alter, vary and transfer the same as they shall think fit; always continuing the same upon similar security. The dividends, interest and produce thereof, or so much thereof as shall be necessary, I desire may be applied in the maintenance, education and bringing up of my said daughter, and in the support of my said wife, until the former shall attain her said age of twenty-one years; and, when and so soon as my said daughter shall attain her said age, then I give and bequeath to her the sum of 2000*l.*, part of my said personal estate, for her own use, benefit and disposal. And my will also is that, when my said daughter shall attain her said age of twenty-one years, then that my said executors, or the survivor, his executors or administrators, shall pay all the clear dividends, interest and produce of my said personal estate and effects, as and when the same shall accrue due, unto the said *Elizabeth*, my wife, during her life, she keeping herself single and unmarried during the life of the said *Elizabeth*, my daughter, and, from and after the decease of the said *Elizabeth*, my wife, or her intermarriage in the lifetime of my said daughter (which shall first happen) *then I give and bequeath all and every my said personal estate and effects unto my said daughter; the same to be always considered as vested in her upon her attaining her said age of twenty-one years, and to be subject to her disposition thereof.* Provided nevertheless, and my mind is that, in case the said *Elizabeth*, my wife,

should, at any time hereafter in the lifetime of my said daughter, intermarry with any person whomsoever, then I revoke the bequest hereinbefore made to her, and do, in lieu thereof, give and bequeath to her the clear yearly sum of 50*l.*, the same to be paid to her half-yearly: and my will further is that, in case the said *Elizabeth*, my daughter, shall happen to depart this life without attaining her said age of twenty-one years, *or without disposing, by her will, of the property hereby devised to her*, then that the same and every part thereof shall be subject to the disposition, by will, of the said *Elizabeth*, my wife, whether she shall be married or sole, such disposition nevertheless, to be confined to my brother and sister, or my several nephews and nieces, or their respective children, and to be given to them, some or one of them, in such shares and proportions as my said wife, in her discretion, shall think fit: and, in default of such her disposition thereof, then I give the said personal estate and effects equally amongst such of them as shall be living at her death, and the issue of such as may be dead, such issue taking their deceased parent's share equally amongst them."

The testator died on the 11th of June 1809, leaving his wife and daughter surviving. On the 27th of June 1822, the daughter, who was still under age, married *John Henry Borton*, with the consent of her guardians. Shortly before the marriage, articles for a settlement were made by which Mr. and Mrs. *Borton* covenanted that, in case the marriage should take effect, they and all other necessary parties, would, as soon as the case would admit, assign all the sums of money which, under or by virtue of the testator's will, should become vested in Mrs. *Borton* when she should attain twenty-one, and which she, or Mr. *Borton* in her right, would become

1849.

BORTON v. BORTON.

entitled to receive on the death or second marriage of the testator's widow, to the trustees of the articles, in trust to invest the same in government or real securities, and to stand possessed of the securities upon certain trusts for the benefit of Mr. and Mrs. *Borton* and their children.

Mrs. *Borton* attained twenty-one in October 1822; but no settlement was ever made in pursuance of the articles. There was issue of the marriage three children.

The testator's widow died in February 1848, without having exercised the power of appointment given to her oy the testator's will.

The bill in this Cause was filed in May 1848. At that time, the sum of 11,429*l.* Three per Cents., which had been purchased with the proceeds of the real and personal estates of the testator, was standing in the name of the *Accountant-General* in trust in a suit which Mrs. *Borton* (who was living separate from her husband) instituted, in 1844, for the administration of the testator's estate, and for the performance of the trusts of his will: and a small part of the testator's real estates remained unsold.

The bill in this Cause, was filed by the children of Mr. and Mrs. *Borton*, against their father and mother, the surviving trustees of the will and of the articles, and the children of the testator's brother and sister (both of whom were dead), praying *that the articles might be specifically performed*, and that proper provision might be made, under the direction of the Court, for giving effect to them and for reducing into the possession

of Mr. *Borton*, for that purpose, all the property covenanted to be comprised in the settlement agreed to be made as before mentioned; and, for that purpose, that the 11,429*l.* Stock, might be transferred into and in trust in the present Cause, and might be declared to be subject to the trusts and provisions of the articles; and that the remaining part of the testator's real estates might also be declared to be subject to the trusts and provisions of the articles; and that it might be sold, and that the produce of the sale and the rents and profits until it should be sold, might be applied by *Marsh* and *William Repton*, the surviving trustees thereof, accordingly; and that a proper settlement might be executed in pursuance of the articles; and that the trusts of the articles and of the settlement to be executed in pursuance thereof, might be performed under the decree of the Court; and that the rights and interests of the Plaintiffs and of all other parties, under the articles and the settlement to be executed in pursuance thereof, might be ascertained and declared and provided for.

The Cause now came on to be heard. The questions were whether Mrs. *Borton*, on attaining twenty-one, took an absolute interest, under the testator's will, in the property to which her mother was entitled during her widowhood, or only a life-interest with a testamentary power of appointment: and whether the marriage-articles were binding upon her.

Mr. *Stuart* and Mr. *Craig*, for the Plaintiffs, and Mr. *Rolt* and Mr. *Bromley*, for Mr. *Borton*, who was willing to perform the marriage-articles, relied on the words: "The same to be always considered as vested in her upon her attaining her said age of twenty-one years, and

1849.

BORTON v. BORTON.

to be subject to her disposition thereof;" as giving Mrs. *Borton* an absolute interest in the property in question, on her attaining twenty-one. They added that one of the events in which the property was expressed to be given over, namely, Mrs. *Borton's* dying before she attained twenty-one, had not happened; and that the gift over in the other event, namely, her not disposing of the property by her will, was inconsistent with the prior gift, and an attempt to deprive the property of one of its legal incidents, which was that, if Mrs. *Borton* died intestate, it would devolve to her next of kin; and, consequently, that the gift over, in that event, was void. They cited *Bradley* v. *Peixoto* (*a*), *Bull* v. *Kingston* (*b*), *Ross* v. *Ross* (*c*), and *Green* v. *Harvey* (*d*).

Mr. *Shelford* appeared for the children of the testator's brother and sister, and for the surviving trustees of the will and marriage-articles.

Mr. *Bethell* and Mr. *Hardy*, for Mrs. *Borton*, contended that she took only a life interest in the property, with a power to dispose of it by will; but, whatever might be the extent of her interest, that it was a reversionary and contingent interest in *choses in action* which still remained outstanding, and she was an infant when the articles were executed; and, therefore, the articles were wholly inoperative so far as she was concerned: *Ellison* v. *Elwin* (*e*), and *Le Vasseur* v. *Scratton* (*f*): but that Mr. *Borton* was bound by the articles; and had, in effect, covenanted, thereby, that he never would reduce the property into posses-

(*a*) 3 Ves. 324.
(*b*) 1 Mer. 314.
(*c*) 1 Jac. & Walk. 154.
(*d*) 1 Hare, 428.
(*e*) *Ante*, Vol. XIII. page 309.
(*f*) *Ante*, Vol. XIV. page 116.

sion. They concluded by observing that the Court had no jurisdiction to decide questions between Mr. and Mrs. *Borton*, in a suit to which they were co-Defendants.

Mr. *Stuart*, in reply, referred to *Simson* v. *Jones* (*g*) as showing the effect which the marriage of a female infant had on her personal chattels.

The VICE-CHANCELLOR:

With respect to the question on the will, I think that not one of the authorities that have been quoted, is really applicable to it.

In *Bradley* v. *Peixoto*, there was a gift: "to my son, *Henry*, of the dividends arising from the 1620*l.* of my Bank Stock, for his support during the term of his life; but, at his decease, the said 1620*l.* Bank Stock to devolve to his heirs, executors, administrators and assigns." That that was an absolute gift, there can be no question. Then, after a moral reflection upon the improvidence of children, the testator said: "I will that, if my wife or any one of my children, shall attempt to dispose of all or any part of the Bank Stock, they shall forfeit the whole of their share, principal and interest." What did that case decide, but that, where there was a clear absolute gift of property to a person with a proviso that he should not dispose of it, the gift was good and the proviso void?

In *Bull* v. *Kingston*, Sir *William Grant* says: "The will is to be read as if it stood thus: I give, to *Charlotte Williams*, the residue of my estate, together with the

(*g*) 2 Russ. & Myl. 365; see 376.

1849.

BORTON v. BORTON.

right of disposing of the same by will, except to *E. P.*; and, if she dies without a will, then I give, whatever may remain at her death, to *William Ashby*. This makes the whole intelligible and consistent. She gives to *Charlotte Williams*, as a married woman, the right of disposing, by will, of the property vested in her, independently of the control of her husband; and she intended, at the same time, that if anything was left undisposed of by her, it should go to *William Ashby*. But this is an intention that must fail on account of its uncertainty."

Then, in *Ross* v. *Ross*, the question arose on the following gift: "I give, to my son, the sum of 2000*l.* to be paid to him at his age of twenty-five years, or at any time betwixt the age of twenty-one and twenty-five, should my executors think proper so to do; and the interest thereof, in the mean time, to be applied towards his maintenance and education: and, in case he should not receive or dispose of, by will or otherwise, in his lifetime, the aforesaid sum of 2000*l.*, then the said sum shall return and be paid to the heir entail in possession of the estate of *Shandwick* for the time being." That was a gift absolutely; evidently implying a power of disposition, and saying that, in case he should not receive or dispose of it by will or otherwise, that is, in any manner whatever, then that the 2000*l.* should go over. But there is nothing like that in the present case. And the case of *Green* v. *Harvey* is a case, in terms, utterly unlike the present.

It has always appeared to me that one of the best modes of construing a will, is to consider the use which the testator, himself, makes of any leading, governing word in his will. And I think that, by the word, "disposition" the testator invariably means a testamentary

disposition only; except in the single case where he evidently shows that he is not so applying the word: I mean where he directs the trustees to sell and dispose of his real estates, either by public auction or private contract. There the meaning of the word, "dispose," is so bound up and confined by the concomitant words, that it has not the meaning which it bears in the other parts of the will. Observe how the testator proceeds: he says: "The money arising from such sale or sales and from the rents thereof in the mean time, I desire may be added to and considered as part of my personal estate, and be subject to the disposition hereinafter made thereof:" that is, a testamentary disposition: his own testamentary disposition. Then the expression in the gift to the daughter, is: "to be always considered as vested in her upon her attaining her said age of twenty-one years, and to be subject to her disposition thereof." If you read on a little further, you must take the disposition, mentioned in the passage which I have just now read, to be the disposition that is spoken of in the next clause but one. There the words are: "In case my daughter shall happen to depart this life without attaining her said age of twenty-one years, or without disposing, by her will, of the property hereby devised to her." And it seems to me that you necessarily must connect the disposition by will with the former words: "disposition thereof." Then the testator makes a gift over, in favour of the mother, in case the daughter should not dispose of her property, and he says: "that the same and every part thereof, shall be subject to the disposition by will of the said *Elizabeth* my wife:" and, afterwards, he directs to whom the property shall go: "in default of such her disposition thereof." And, therefore, my opinion is that the true construction of the gift in question is that it is a gift to the daughter

1849.

BORTON v. BORTON.

for life, with a testamentary power of disposition over the property comprised in the gift; and that the testator intended that, if his daughter did not make a testamentary disposition of the property, it should go over. The consequence is that the daughter has not the absolute interest in the property.

But, supposing that she had the absolute interest, the question is whether, as between her and her husband, the property not having been reduced into the possession of the husband, these Articles are binding? My opinion is that, inasmuch as the husband has not reduced the property into possession, the Articles cannot bind it. Whether the husband may not be liable in respect of such interest in the property as he may ultimately acquire, is another question: but, at present, no relief can be given on this bill. The case of *Ellison* v. *Elwin* is a conclusive authority on the point.

Bill dismissed with costs.

DYKES *v.* TAYLOR.

1849: 15th January and 3rd March.

Sale under decree. Title. Practice.

A testator having directed his real estates to be sold, the decree in a suit for the performance of the trusts of his will, directed the *Master* to inquire and state what estates passed by the will, and that all the estates which the *Master should find* to have passed, should be sold with his approbation. The *Master* having ascertained, from a state of facts laid before him, what estates passed, proceeded to sell them. The purchaser objected to the title because the *Master* had not made any report in pursuance of the first direction in the decree. But, it being the practice of the *Masters* in such a case, to sell before they make any report, the objection was overruled.

A TESTATOR having by his will, which was dated the 30th of January 1838, devised all his real estates to trustees, in trust to sell, the decree in a suit for the administration of his estates and for the performance of the trusts of his will, directed the *Master* to inquire and state of what real estates the testator was seised at the respective (several, *qu.*) times of making his will and of his death or at either of those times, and whether the same estates or any and which of them, passed by his will or descended to his heir-at-law; and that all such real estates as the *Master should find* passed by the will, should be sold with the approbation of the *Master*.

The *Master*, having approved of a state of facts as to the real estates which passed by the will, proceeded to sell them, but *without having made any report in pursuance of the decree.*

On a motion being made, on behalf of the Plaintiffs, for payment, into Court, of the purchase-money for Lot 3 of the estates, the purchaser obtained an order directing the *Master* to inquire and state whether the vendors could make a good title. The *Master* reported in the affirmative. The purchaser excepted to the report; because the decree did not authorize

Powell v. 2 L Rep 10 Ch. 132

1849.

DYKES v. TAYLOR.

the *Master* to sell the estates, *until he should have made his report finding which of them passed by the will.*

Mr. *Bethell* and Mr. *Glasse* supported the exception.

Mr. *James Parker* and Mr. *Stevens*, in support of the report, said that it was the practice of the *Masters*, when they had to carry into effect a decree like the one in this Case, to sell the estates before they made any report upon the preliminary inquiry.

The *Vice-Chancellor* ordered the exception to stand over in order that he might inquire into the practice.

On the 3rd of March,

The *Vice-Chancellor* said that he had received a certificate from *Master Dowdeswell*, and made inquiries of all the other *Masters* except two; and the result was that it was the settled practice of the *Masters*, in all cases in which they were directed to sell the real estates of which they should find a testator died seised, to proceed to a sale, before they made any report finding what those estates were: therefore, that practice must be considered to be as binding as a settled rule of the Court was; and, consequently, he should overrule the exception.

TURNER *v.* NICHOLLS.

1849: 13th March.

Plea and pleading. Bankrupt. Leaseholds.

The interest of a bankrupt in leaseholds, is not finally divested until *the creditors'* assignees are chosen; and, therefore, if only *the official* assignee has been appointed, the bankrupt cannot plead his bankruptcy to a bill filed against him, to have the trusts of the will under which he took the leaseholds, carried into execution.

THE object of the bill was to have the trusts of a will, under which the Defendant was entitled to leasehold property, carried into execution under the decree of the Court. Shortly after the suit was commenced, a fiat in bankruptcy issued against the Defendant, under which he was adjudged a bankrupt, and an official assignee was appointed. Before the day fixed for choosing the creditors' assignees, the Defendant pleaded, in bar to the bill, the issuing of the fiat, the appointment of the official assignee, and that all the right and interest which he would otherwise have had in the testator's property, was vested in the official assignee.

Mr. *Rolt* and Mr. *E. F. Smith*, in support of the plea, referred to *Turner* v. *Robinson* (*a*), *Tarlton* v. *Hornby* (*b*), *Man* v. *Ricketts* (*c*), *Robertson* v. *Southgate* (*d*), and 1 & 2 Will. IV. c. 56, sect. 25, and 5 & 6 Vict. c. 122, sect. 23.

Mr. *Bethell* and Mr. *Barber* appeared to support the bill; but

The VICE-CHANCELLOR, without hearing them, said:

The plea does not aver that the official assignee has elected to hold the leasehold property: and if it had so averred, it would not have shown that the bankrupt's

(*a*) 1 Sim. & Stu. 3.
(*b*) 1 Youn. & Coll. Exch. Ca. 333.
(*c*) 1 Phill. 617.
(*d*) 5 Hare, 223.

1849.

TURNER v. NICHOLLS.

right and interest in that property, is finally divested: for the creditors' assignees, when they are chosen, will not be bound by the election of the official assignee: therefore the plea must be overruled.

By consent, the plea was ordered to stand for an answer.

1849: 14th March.

Injunction. Practice. Defendant.

A defendant cannot move to dissolve an injunction absolutely, in the first instance, notwithstanding the time at which his answer was to be deemed sufficient, has long since passed.

RAINCOCK *v.* YOUNG.

THE Plaintiff obtained the common injunction for want of answer. The Defendant put in his answer; but did not attempt to dissolve the injunction, until his answer not only was to be deemed sufficient according to the Orders of the Court, but had been replied to. In the mean time the action restrained by the injunction, was tried, and, the verdict being in favour of the Defendant, a motion was now made, on his behalf, that the Plaintiff might pay, into Court, the amount of the damages and costs recovered in the action, or that the injunction might be dissolved *absolutely*.

Mr. *Bethell* and Mr. *Hardy*, for the Plaintiff, objected that the motion was irregular; because the Plaintiff had not obtained an order *nisi*, to dissolve the injunction.

Mr. *Stuart* and Mr. *Haldane*, for the Defendant, said that, in the advanced state of the proceedings in the Cause, the answer must be assumed to be sufficient; and, therefore, it was not necessary for the Defendant to

obtain an order *nisi* before he moved to dissolve the injunction absolutely: *Lacy* v. *Hornby* (*a*).

The VICE-CHANCELLOR:

The case of *Lacy* v. *Hornby* seems to be an authority that, where no order *nisi* has been made, such an order must be obtained before the Defendant can move to dissolve the injunction absolutely; for it is plain that Lord *Eldon* upheld the motion to dissolve the injunction in that case, because an order *nisi* had been obtained, and its effect had been produced. The injunction, however, still remained undissolved; and there was no way of getting rid of it except by moving to dissolve it absolutely. But, in this case, the very circumstance that enabled Lord *Eldon* to hear the motion to dissolve absolutely, is wanting.

My opinion is that the objection made on behalf of the Plaintiff, is a good one; and I shall refuse the motion with costs.

(*a*) 2 Ves. & Beam. 291.

1849:
26th March.

Construction. Deed. Separate use.

A. demised lands to *B.* and *C.* in trust to permit his wife, *and such person and persons, and their executors and administrators, as she should, by her will, bequeath the same to,* to take to his and their own use, the rents of the lands, during the term, exclusively, and notwithstanding his wife's then or any future coverture, and not to be subject to the control or disposal of any future husband: and *A.* covenanted for the quiet enjoyment of the lands, by his wife, during the term.

GLOVER *v.* HALL.

BY a deed dated the 8th of March 1804, *Samuel Glover*, since deceased, granted and demised, to *Matthew Jefferys* and *John Jefferys*, their executors and administrators, a freehold dwelling-house and certain closes or parcels of land, for the term of ninety-nine years, at the rent of a peppercorn; upon the special trust and confidence that they and the survivor of them and the executors and administrators of such survivor, should permit and suffer his wife, *Phillis Glover*, since deceased, *and such person and persons, and their executors and administrators, as she should, in and by her last will and testament* duly executed, give, devise and bequeath the same to, to take, to his, her, or their own use and benefit, the rents, issues and profits thereof during the term, exclusively, and notwithstanding her then present coverture or any future husband, and not to be subject or liable to the control or disposal of any future husband she might thereafter intermarry with; and her receipt and receipts, under her hand, to be alone deemed and taken as a good discharge and discharges for the same: and the deed contained a covenant, on the part of *Samuel Glover*, for the quiet enjoyment of the demised premises, by *Phillis Glover* and her assigns, during the term.

The plaintiff claimed to be entitled to the premises under the will of *Phillis Glover*, in which she stated

Held that the wife was the *cestui que trust* of the lands for the whole of the term, and not, merely, for so many years of it as she should live, with remainder to such persons as she should appoint by her will.

that she had sold *her life-interest* in the premises; but that, after her death, they would revert to the use of her will.

The Defendant, Sir *Benjamin Hall*, alleged that, by a deed dated in 1810 and made between *Phillis Glover*, *Matthew Jefferys*, *John Jefferys* and *Benjamin Hall*, the Defendant's father, after reciting the deed of March 1804, the death of *Samuel Glover* and that *Benjamin Hall* had agreed, with *Phillis Glover*, for the purchase of *all her estate and interest* in the premises for 1400*l.*, the premises and all the estate, right, title, interest, term and terms of years, &c., both at law and in equity, of *Matthew* and *John Jefferys* and *Phillis Glover* therein, were assigned, surrendered and confirmed, by *Matthew* and *John Jefferys* and *Phillis Glover*, to *Benjamin Hall*, his executors, administrators and assigns, in consideration of 1400*l.* paid by him to *Phillis Glover*.

The question at the hearing of the Cause, was whether, under the deed of March 1804, *Phillis Glover* was entitled to the premises for the whole of the term of ninety-nine years, or only for so many years of it as she should live, with a power to dispose of the premises for the remainder of the term, by her will.

Mr. *Malins* and Mr. *Collins*, for the Plaintiff, contended that the latter was the true construction and effect of the deed. They cited *Reid* v. *Shergold* (*a*), and *Doe* v. *Thorley* (*b*).

Mr. *Bethell* and Mr. *Goldsmid*, for Sir *Benjamin*

(*a*) 10 Ves. 370. (*b*) 10 East, 438.

1849.

GLOVER v. HALL.

Hall, contended that *Phillis Glover* was entitled to the premises for the whole of the term.

Mr. *Farrer* appeared for *John Jefferys*, who had survived his co-trustee *Matthew Jefferys*.

The VICE-CHANCELLOR:

The question in this case, is whether, under the limitation which is contained in the deed of March 1804, *Phillis Glover* was the *cestui que trust* of the tenements comprised in it, for the whole of the term of ninety-nine years, or only for so many years of it as she might live, with remainder to such person or persons as she should, by will, appoint.

The trusts of the term were declared in the following words: "That the said *Matthew Jefferys* and *John Jefferys* and the survivor of them, and the executors and administrators of such survivor, should permit and suffer *Phillis Glover*, and such person and persons, and their executors and administrators, as she should, in and by her last will and testament duly executed, give, devise and bequeath the same to, to take, to his, her and their own use and benefit, the rents, issues and profits of the said lands and premises, with their appurtenances, for and during the term of ninety-nine years as aforesaid, exclusively, and notwithstanding her then present coverture or any future husband, and not to be subject or liable to the debts, control or disposal of any future husband she might thereafter intermarry with; and her receipt alone, under her hand, to be deemed and taken as a good discharge for the same." Now the words: "such person and persons, and their executors and administrators, as she should, in and by her last will and testament duly executed, give, devise

and bequeath the same to," are superfluous: because they are followed by words which show that the trustees were to hold the tenements for her separate use; and a testamentary power of disposition is one of the incidents to that modification of property.

Besides, the deed contains a covenant, by the grantor, for the quiet enjoyment of the property, by *Phillis Glover* and her assigns, during the whole of the term. Therefore, I am clearly of opinion that he intended her to take the trust of the term, so long as it lasted, for her separate use.

Bill dismissed.

1849.
27th March.

Amendment. Injunction.

A. obtained a special injunction, until answer or further order, in a suit in which he was sole Plaintiff; and then amended the bill by making *B.* a Co-plaintiff.

Held that the injunction was gone, by the amendment.

THE ATTORNEY-GENERAL *v.* MARSH.

THIS suit was instituted on the 6th of February 1849, by information and bill. *George Squire* was the relator for and on behalf of *John Burder Squire*, a lunatic, and he was also the Complainant. The information and bill prayed for an injunction to restrain the Defendant, *Marsh*, from further intermeddling with, selling, applying or disposing of all or any of the stock, crops and produce therein mentioned, or other the property and effects of or belonging to the lunatic. On the 16th of February, the Court granted the injunction *until* Marsh *should fully answer the information and bill or the Court make order to the contrary.* On the same day, *Marsh* filed a demurrer for want of equity and multifariousness, and because the lunatic was a necessary party to the suit. The demurrer was submitted to; and, on the 21st of February, an order was obtained under which the record was amended by (amongst other things) making the lunatic a Co-plaintiff with *George Squire.*

On the 23rd of March, *Marsh* was served with a notice which, according to the copy of it annexed to the Defendant's brief, was intituled in a Cause: "Between her Majesty's *Attorney-General*, at and by the relation of *George Squire*, for and on behalf of *John Burder Squire*, a lunatic, and *the said John Burder Squire* and *George Squire*, Informant and Plaintiffs, and *J. Marsh* and *E. Read*, Defendants, by original and amended information and bill." The purport of the notice was that a

1849.

THE ATT.-GENERAL v. MARSH.

motion would be made, on the 27th of March, on behalf of the Informant and *the Plaintiff John Burder Squire*, that *Marsh* might stand committed to the Queen's prison, for breach of the writ of injunction issued *in this Cause*, dated the 16th day of February 1849, whereby he was enjoined and restrained from, &c., &c.

Mr. *Rolt* and Mr. *Rogers* supported the motion.

Mr. *Bethell* opposed it. He said that the suit in which the motion was made, was a different suit from that in which the injunction had been obtained: that one was a suit by the *Attorney-General* and *George Squire*, and the other, a suit by the *Attorney-General*, *George Squire* and *John Burder Squire*: that every order made in a suit in which *A. B.* was sole Plaintiff, dropped as soon as that suit was converted into one in which *A. B.* and *C. D.* were Co-plaintiffs; and that the amending of the information and bill in this Case was, in effect, an admission that the injunction had been wrongly obtained.

Mr. *Smythe*, who was with Mr. *Bethell*, cited *Schneider* v. *Lizardi* (*a*) as an authority that the submission to the demurrer, had put an end to the injunction.

Mr. *Rolt*, in reply, said that the amendments were merely formal, and that the merits of the case were not touched, nor was the constitution of the suit substantially altered by them.

THE VICE-CHANCELLOR:

I remember that Lord *Eldon* expressed an opinion,

(*a*) 9 Beav. 461.

1849.

THE ATT.-GENERAL v. MARSH.

in a case before him, that, if the bill in a suit in which an injunction had been granted, was dismissed, it was necessary to obtain a separate order to dissolve the injunction. But I apprehend that his Lordship was then speaking of an injunction which either had been granted absolutely in the first instance, or had been made absolute on the merits, and not of an injunction which, in its very form, is liable to be dissolved on a certain contingency. I use that language with reference to the injunction now sought to be dissolved. It was granted to restrain the Defendant from doing certain acts until he should fully answer the information and bill, or the Court should make order to the contrary. But the parties who obtained that injunction, have made it impossible, for the Defendant, to answer the information and bill on which the injunction was obtained; for the record has been so metamorphosed by the addition of a Co-plaintiff, that the old information and bill no longer exist. And, inasmuch as the parties who obtained the injunction, have, by amending the record in the way they have done, made it impossible for the Defendant to avail himself of the contingency mentioned in the order for the injunction (for I do not put it on the ground of the demurrer having been submitted to and allowed), my opinion is that the injunction is gone.

RAMSAY *v.* THORNGATE.

1849: 27th March.

Rent-charge. Construction. Will.

Testator devised his freehold estates to *A.* and *B.* and their heirs, in trust to permit his wife to hold and enjoy the same and to receive the rents thereof for her life; and, after her decease, in trust to permit his nephew, his heirs and assigns to hold and enjoy the estates and to receive the rents thereof for ever, but subject to the payment of 20*l.*, yearly for ever, to his niece, *her executors, administrators and assigns;* with the payment of which sum the testator made chargeable his said estates, *in manner and form aforesaid,* immediately after the decease of his wife.

Held that the niece took a legal *rent-charge,* of 20*l. per annum, in fee.*

THIS was a suit for the specific performance of a contract for the sale of a yearly sum of 20*l.*, which was described, in the contract, as an annuity or *rent-charge issuing out of a freehold estate* called *Gurnards*, and, by the will of *John Wilkinson*, created and made payable for ever, to *Eleanor Wilkinson*, (under whom the vendor claimed,) *her heirs*, executors, administrators and assigns.

John Wilkinson, by his will dated in 1768, devised his freehold farm, called *Gurnard's Farm*, to *James Gill* and *John Jacob*; to hold to them, their heirs and assigns for ever, without impeachment of waste, in trust, nevertheless, that they, their heirs and assigns, should permit his wife, since deceased, to have, hold and enjoy the same, and to receive the rents and profits thereof, for her life, without impeachment of waste; and from and immediately after her decease, upon trust to permit and suffer his nephew, his *heirs* and assigns, to have, hold and enjoy the said farm, and to receive the rents and profits thereof for ever; but subject, nevertheless, to the payment of 20*l.*, yearly and every year for ever, to *Eleanor Wilkinson*, her *executors, administrators* and assigns; with the payment of which said sum of 20*l.*, the testator, thereby, *made chargeable his said freehold estate, in manner and form aforesaid*, immediately from and after the decease of his said wife:

1849.

RAMSAY v. THORNGATE.

but in case *James Wilkinson* should die before the testator's wife, then upon trust that *Gill* and *Jacob*, their heirs and assigns, should permit and suffer *Eleanor Wilkinson*, *her heirs* and assigns, to hold and enjoy the said premises and to receive the rents and profits thereof for ever.

The question at the hearing of the Cause, was whether the yearly sum of 20*l.* was a *rent-charge in fee.*

Mr. *Stuart* and Mr. *Follett*, for the Plaintiff, the vendor, said that, where lands were devised, as they were by the will in this case, to a person in fee, subject to and chargeable with the payment of a certain sum of money, yearly and every year for ever, to another person, her executors, administrators and assigns, the yearly sum was a rent-charge in fee: *Buttery* v. *Robinson* (*a*). They distinguished the present case from *The Earl of Stafford v. Buckley* (*b*), on the ground that the annuity in that case, though granted in fee, was charged upon funds which were purely personal in their nature.

Mr. *Bethell* and Mr. *W. D. Lewis*, for the Defendant, the purchaser, said that the thing which the Plaintiff had to sell and the thing which he professed to sell and the Defendant agreed to purchase, were totally dissimilar: that the words in the will: "subject nevertheless to the payment of 20*l.*, yearly and every year," applied, not to the testator's freehold estates, but to his nephew, the devisee of them: that, if the subsequent words did create a charge on the freehold estates, the words: "in manner and form aforesaid," made the annuity payable as it was given, namely, to the annuitant, her executors and adminis-

(*a*) 3 Bing. 392. (*b*) 2 Vez. 171.

trators; and, consequently, the annuity was not a rent-charge or real hereditament, (for the purchase of which the Defendant stipulated,) but was an interest of a personal nature transmissible to personal representatives: *Taylor* v. *Martindale* (*c*): that the words, "executors and administrators" were inapplicable to real property; and, therefore, where lands were devised to a man, his executors and administrators, the Court was *compelled* to construe those words, "heirs;" but when the subject of the gift was an annuity, those words were strictly applicable to it; besides which the testator had used the word, "heirs," where he devised his freehold estates; therefore, the Court was bound to give the words, "executors and administrators," their legitimate meaning and effect: that, at all events, the nature of the annuity was doubtful; and, for that reason, as well as because the vendor had misdescribed it, the purchaser ought not to be compelled to complete his purchase.

The VICE-CHANCELLOR:

If the Defendant wishes to take the opinion of a Court of Law upon the question, whether the annuity in this case, is a rent-charge or not, I will direct a case to be stated for the opinion of a Court of Law.

The Defendant's Counsel replied that they should be satisfied with his Honour's opinion.

The VICE-CHANCELLOR then proceeded as follows:

In my opinion the true construction of the will is that a rent-charge is given: it is not given out of a mixed fund; but it seems to me that there has been a devise of a rent-charge.

(*c*) *Ante*, Vol. XII. page 158.

1849.

RAMSAY v. THORNGATE.

The testator has devised his freehold estates to two persons and their heirs, in trust to permit his wife to hold and enjoy the same and to receive the rents and profits thereof, for her life, and, after her decease, upon trust to permit his nephew, his heirs and assigns, to hold and enjoy the estates and to receive the rents and profits thereof for ever. Now a devise of tenements to *A.* and his heirs, in trust to permit *B.* and his heirs to receive the rents, vests the legal estate, in fee, in *B.* Then the testator says: "But subject, nevertheless, to the payment of 20*l.*, yearly and every year for ever, to my niece *Eleanor Wilkinson*, her executors, administrators and assigns, with the payment of which said sum of 20*l.* I hereby make chargeable my said freehold estates, in manner and form aforesaid, immediately from and after the decease of my said wife." The testator has here used two sentences instead of one; but the effect of his will is to vest his estates in his nephew in fee, subject to the payment of a rent-charge to his niece in fee. Therefore, there is no misdescription in the contract: and there must be a decree for a specific performance; and the purchaser must pay the costs of the suit.

PARROTT *v.* CONGREVE.

1849:
28th March.

Bill of Sale. Insolvent.

In January 1848, *A.* gave *B.* a bill of sale of his household furniture, to secure a debt due from him to *B.* On the 21st of February 1849, *B.* took possession of the furniture, and advertised it for sale. On the 8th of March following, a petition presented by *A.* under the Insolvent Debtors' Act, for protection from process, was filed.

The *Vice-Chancellor* held that, though the bill of sale was unaffected, yet *B.'s* right to retain possession of the furniture was defeated.

The *Lord Chancellor*, on appeal, directed *B.* to bring an action to try his right to the furniture.

BY an indenture dated the first of January 1841, the Reverend *H. A. Small*, assigned to the Defendant, by way of mortgage, all the goods, utensils, and implements in and about his dwelling-house, outhouses and premises at *Haversham*, in *Buckinghamshire*, for securing the repayment of 600*l.* which the Defendant had lent him: and the indenture declared that, after default should be made in payment of the 600*l.*, it should be lawful for the Defendant to take possession of, and to hold and enjoy the premises thereby assigned, and also to sell and dispose of the same and to retain the 600*l.* out of the proceeds. By an indenture dated the first of July 1843, *Small* charged the chattels, assigned by the first-mentioned indenture, with the repayment of the further sum of 400*l.* to the Defendant: and it was thereby agreed and declared that it should be lawful, for *Small*, to hold the chattels, until default should be made in payment of the 400*l.*

By an indenture dated the 26th January 1848, *Small* assigned to the Defendant all the household goods and furniture, fixtures, plate, linen, china and other effects in and about his dwelling-house and premises (wearing apparel only excepted) and also all his live and dead farming-stock, crops of grain and hay, implements of husbandry, and all his other personal estate and effects in and about his farm, lands and premises at *Haversham*; to hold the same to the Defendant, by way of security for the repayment of the further sum of 606*l.* which he owed the Defendant: and it was thereby de-

Robinson v Hodge, 17 Jur. 185.

1849.

PARROTT v. CONGREVE.

clared that it should be lawful for the Defendant, at any time or times thereafter, to seize and take possession of the household goods and furniture, fixtures, and all other the effects and premises thereby assigned, and of all such live and dead farming-stock, crops and implements of husbandry, and other effects which might, from time to time, be substituted in lieu of the stock, crops and implements of husbandry thereby assigned, or which should, for the time being, be found in or about the dwelling-house, farm, lands and premises, and to sell the same, and retain the 606*l.* out of the proceeds.

On the 26th of June 1848, the Defendant gave *Small* notice that, if the before-mentioned sums were not paid on or before the 29th of September then next, he should, in pursuance of the powers given to him by the before-mentioned indentures, sell the articles therein comprised. On the 21st of February 1849, at which time those sums still remained unpaid, *Small* took possession of the articles, by his bailiff, and authorized the bailiff to sell them in such manner as he should thereafter direct; and, shortly afterwards, he advertised the articles for sale by auction: but, before the sale took place, *Small* presented his petition for protection from process, to the County Court of *Buckinghamshire*, according to the provisions of the Act then in force for the relief of insolvent debtors. The petition was duly filed on the same day; and the bill alleged that, thereby and upon the presentation of the petition, all *Small's* estate and effects became vested in the Plaintiff as the official assignee thereof.

The bill prayed that the Defendant might be decreed to deliver up, to the Plaintiff as such official assignee, all the articles which he had taken possession of as

aforesaid; and that he, his bailiffs and agents, might be restrained from selling, removing, or disposing of the articles comprised in the indenture of the 26th of January 1848, which it termed a bill of sale.

The injunction was obtained *ex parte*. The Defendant, afterwards, put in his answer, in which he alleged that each of the three indentures, was made three months before the filing of *Small's* petition, and not with the view or intention, by him, of petitioning the Court for protection from process under the Act for the relief of insolvent debtors. That allegation was made because the 19th section of 7 & 8 Vict. c. 96 (to amend the law of insolvency, bankruptcy and execution) enacts:

"That, if the petitioner shall, before or after the filing of his petition, in contemplation of his becoming insolvent, or being in insolvent circumstances, voluntarily convey, assign, transfer, charge, deliver, or make over any estate, real or personal, security for money, bond, bill, note, money, goods, or effects whatsoever, to any creditor or creditors, or to any person or persons in trust for, or to or for the use, benefit, or advantage of any creditor or creditors, or to any person who is or may be liable as surety for such petitioner, every such conveyance, assignment, transfer, charge, delivery and making over, shall be deemed fraudulent and void as against any assignee or assignees of the estate and effects of such petitioner appointed under the provisions of the recited Act (5 & 6 Vict. c. 116, for the relief of insolvent debtors) and of this Act, or of either of them: Provided always, that no such conveyance, assignment, transfer, charge, delivery, or making over, shall be so deemed fraudulent and void if made at any time prior to three

1849.

PARROTT v. CONGREVE.

months before the filing of the petition, and not with the view or intention, by the party so conveying, assigning, transferring, charging, delivering or making over, of petitioning the Court for protection from process."

Mr. *Malins* and Mr. *Metcalfe*, for the Defendant, now moved to dissolve the injunction. They said that not only were the assignments which *Small* had made to the Defendant, unimpeachable, but the Defendant had taken possession of the articles comprised in them, before *Small* presented his petition; and, therefore, the articles were taken out of his order and disposition, and the Defendant's title to them became complete and indefeasible before the petition was presented: that the assignee of an insolvent debtor could not stand in a better situation than the insolvent himself was in when he took the benefit of the Act; and that, when *Small* took the benefit of the Act, the only right which he had, with respect to the articles in question, was a right to the surplus of the money to be produced by the sale of them, after payment of the debts due to the Defendant. *Martindale* v. *Booth* (*a*).

Mr. *Selwyn*, for the Plaintiff, relied on the 21st sect. of the 7 & 8 Vict. c. 96, which enacts: "That, in all cases where any petitioner for protection from process, whose estate shall have been vested in an assignee or assignees under the provisions of the said recited Act and of this Act, or of either of them, shall have executed any warrant of attorney to confess judgment, or shall have given any *cognovit actionem or bill of sale*, whether for a valuable consideration or otherwise, *no person shall, after the filing of the petition of such petitioner*, avail

(*a*) 3 Barn. & Adol. 498.

himself of any execution issued or to be issued upon any judgment obtained or to be obtained upon such warrant of attorney or *cognovit actionem*, either by seizure and sale of the property of such petitioner or any part thereof, or by sale of such property theretofore seized, or any part thereof, or *avail himself of such bill of sale;* but that any person or persons to whom any sum or sums of money shall be due in respect of any such warrant of attorney or *cognovit actionem*, or of such bill of sale, shall and may be a creditor or creditors for the same under the said recited Act and this Act."

Mr. *Selwyn* cited *Hunt* v. *Robins* (*b*) and *Squire* v. *Huetson* (*c*).

The VICE-CHANCELLOR:

I do not entertain any doubt upon the question which has been argued in this case; and, if I had entertained any doubt upon it, I should have thought it right to continue the injunction until the hearing of the Cause, in order that the question might be more fully discussed.

My opinion is that the validity of the bill of sale is not affected by the Act of the 5 & 6 Vict.: for it was made more than three months before Mr. *Small* filed his petition for protection from process, and without any view or intention, on his part, of filing the petition. But it seems to me that, though the bill of sale is unaffected, the Defendant's right to retain the articles which he has taken possession of under it, is defeated. For the 21st section of the Act enacts that, in all cases where any petitioner for protection from process, whose estate shall

(*b*) 3 Queen's Bench Rep. 300.

(*c*) 1 Queen's Bench Rep. 308.

1849.

PARROTT v. CONGREVE.

have been vested in an assignee under the provisions of the recited Act and of that Act or either of them, shall have given any bill of sale, whether for valuable consideration or otherwise, no person shall, after the filing of the petition of such petitioner, avail himself of such bill of sale; but that the person to whom any sum of money shall be due in respect of such bill of sale, shall be a creditor for the same under the recited Act and that Act. My opinion, therefore, is that the Defendant's right to the articles is over-reached by *Small's* insolvency, and that he must obtain the benefit of the bill of sale in the Insolvent Debtors' Court.

Motion refused with costs.

On the 21st of April 1849, the *Lord Chancellor*, on being moved to discharge the *Vice-Chancellor's* order and to dissolve the injunction, ordered the motion to stand over and the Defendant to bring an action to try his right to the articles comprised in the bill of sale.

The parties, afterwards, came to compromise and, consequently, no action was brought.

Hare's Trust 2 Sim. N.S. 113.

IN THE MATTER OF THE TRUSTS CREATED BY THE WILL OF THOMAS BARTHOLOMEW,

AND

IN THE MATTER OF 10 AND 11 VICT. c. 96, FOR BETTER SECURING TRUST-FUNDS AND FOR THE RELIEF OF TRUSTEES.

1849: 31st March.

Legacy. Vesting. Will. Construction.

Testator gave 2000*l.* to trustees in trust to pay the interest to his daughter, for life, and, after her decease, in trust *to pay* the principal unto, between and amongst all her children, *as and when they should attain twenty-one*, in equal shares, "*to whom I* give and bequeath the same *accordingly*."

The testator's daughter had only one child, and that child died an infant.

Held that the 2000*l.* vested in the child on its birth.

THE testator in this case directed the trustees of his will to invest 2000*l.*, in their names, in government or real securities, and to pay the interest and dividends to his daughter, *Mary Ann*, for her separate use for life; and, after her decease, *to pay the* 2000*l. or assign the securities on which the same might be then invested*, unto, between or amongst all and every her child and children *as and when they should severally attain their respective ages of twenty-one* years, in equal shares and proportions, share and share alike, "*to whom I give and bequeath the same accordingly;* with benefit of survivorship to and amongst such child or children in case of the death of any one or more of them before such share or shares of and in the said sum of 2000*l. shall become payable:* and I will that what shall so survive, shall, from time to time, likewise survive and go and be paid in like manner together with the original shares or share of such child or children of and in the said sum of 2000*l.*: and upon further trust that they, my said trustees, shall, in the mean time, after the death of my said daughter, pay and apply the interest and dividends of the said 2000*l.*, for and towards the maintenance, clothing and education of such child or

1849.

In re BARTHOLOMEW'S TRUST.

children of my said daughter until their respective shares thereof *shall become payable*, in proportion to their respective shares therein, as they, my said trustees, shall, in their discretion, think fit."

The testator died in 1826. After his death, his daughter, *Ann*, married *S. Trout*. The only issue of their marriage, was a son, *S. F. Trout*, who died shortly after his birth. Mrs. *Trout* died in 1847. After her death the trustees paid the 2000*l.* into Court under the 10 & 11 Vict. c. 96.

A petition presented, by Mr. *Trout*, to have the fund paid out to him as the personal representative of *S. F. Trout*, now came on to be heard. The question was whether the 2000*l.* vested in *S. F. Trout* on his birth, subject to his mother's life interest; or whether his right to that sum was contingent on his attaining twenty-one.

Mr. *Bethell* and Mr. *Nalder*, in support of the petition, said that the 2000*l.* vested, absolutely, in *S. F. Trout*, on his birth; and that only the payment of it was postponed until he should attain twenty-one. They relied on the words: "to whom I give and bequeath the same accordingly," as being an absolute gift of the 2000*l.*: and on the provisions for survivorship and maintenance, as confirming the construction which they contended for. They cited *Hanson* v. *Graham* (*a*) and *Hammond* v. *Maule* (*b*).

Mr. *Malins*, for the person entitled to the testator's residuary personal estate, said that the testator did not

(*a*) 6 Ves. 239. (*b*) 1 Coll. 281.

intend any child of his daughter, to take a share of the 2000*l.*, unless it attained twenty-one: that there was not a gift, in the first instance, to the children, and then a direction to pay to them when they should attain twenty-one; but there was first a direction to pay to the children when they should attain twenty-one, and, immediately afterwards, a gift to them *accordingly*; so that the period of gift and the period of payment, were the same: and, therefore, the case fell within the principle of *Leake* v. *Robinson* (*c*): that the survivorship-clause showed that no child was to take a transmissible interest until it attained twenty-one: that, if the original gift was clear, the effect of it was not altered by there being a maintenance-clause: that that clause did not make an interest a vested one, if, under the original gift, it was clearly contingent; *Leake* v. *Robinson*; *Vawdry* v. *Geddes* (*d*): that, in *Hammond* v. *Maule*, there was a gift of the capital of the stock directed to be purchased, in one part of the will, and a direction to transfer it, in another part; but, in the present case, the gift and the direction to pay were one and the same.

Mr. *Hetherington* appeared for the trustees.

Mr. *Bethell*, in reply, observed that, if no child took a vested interest until it attained twenty-one, the clause of survivorship would be entirely useless: that the survivorship was to take place in case a child died before its share should become payable; and that the income of the shares was to be applied for the maintenance of the children, until their shares should become payable; therefore, it was evident that the testator meant the time of payment only to be postponed.

(*c*) 2 Mer. 363. (*d*) 1 Russ. & Myl. 203.

1849.

In re BARTHOLOMEW'S TRUST.

The VICE-CHANCELLOR:

The testator first directs the trustees to pay the 2000*l.*, or assign the securities on which it should be invested, unto all the children of his daughter, as and when they should attain twenty-one, and then adds: "To whom I give and bequeath the same accordingly." Therefore, there is a gift independent of the direction to pay: and, that being so, I think that the child of the daughter took a vested interest.*

* Affirmed: see 1 Hall & Twells, 565, and 1 Macnaght. & Gord. 354.

Overruled, Senner v Morris 3 D. F. & J. 53.

MAY *v.* SKEY.

1849: 19th and 21st April.

Debtor and creditor. Jurisdiction.

A. having gone abroad and left his wife unprovided for, the Plaintiff lent her money to purchase necessaries, and she applied it accordingly.

Held that the Plaintiff could not sue *A.* for the money, in a Court of Equity.

THE Defendant having gone abroad and left his wife wholly unprovided for, the Plaintiff lent her money, from time to time, to enable her to purchase necessaries, and she applied it accordingly. On the argument of a general demurrer, one question was whether the Plaintiff could sue the husband for the money, in a Court of Equity.

Mr. *Bacon* and Mr. *Bilton*, in support of the demurrer, contended that the Plaintiff's right (if she had any) was a purely legal one.

Mr. *Bethell* and Mr. *Willcock*, in support of the bill, referred to *Harris* v. *Lee* (*a*), *Marlow* v. *Pitfeild* (*b*),

(*a*) 1 P. W. 482. (*b*) Ibid. 558.

and 2nd Roper on Husband and Wife, Jacob's edition, page 112.

The VICE-CHANCELLOR:

The question is not whether there is a debt, but whether the Court has jurisdiction, in this case, to direct payment of it.

In the cases cited, there were trusts for payment of the husband's debts; which gave the Court jurisdiction; and the only question was whether the Plaintiffs were creditors of the husbands. If they were, there could be no doubt that the Court would execute the trusts in their favour. In this case there is no trust to execute; but the Plaintiff sues, merely, as a creditor of the husband; and, as a mere creditor, she has no equity against the husband.

Demurrer allowed, and leave to amend refused.

Bolitho v. Hellyar 34 Brav. 182

PETO *v.* PETO.

1849: 21st and 23rd April.

Deed. Covenant. Family arrangement.

The eight children of *A.*, being entitled to a fund, equally, in the event of their surviving *B.*, seven of them, in pursuance of an arrangement made amongst themselves whilst the eighth, whose name was *James*, was in *India*, executed a deed, by which they and he were made to covenant with each other, reciprocally, that, in case any of them should die in *B.'s* lifetime leaving a child or children, such child or children should be entitled to the share or shares of his, her, or their parent or parents, in such and the same manner as if such parent or parents had survived *B.*—*James* never executed the deed; but he and six of those who did execute it, survived *B.* The other left children, and those children claimed to be entitled, under the deed, to their parent's share.

Held that the deed was made upon the assumption that all the persons named as parties, would execute it, and, as one of them had not executed it, it was not binding upon the others, though they had executed it.

THE testator in this Cause, by his will dated the 13th of September 1830, bequeathed two fifths of his residuary personal estate to the then present children of *Thomas de la Garde Grissell* and *Ann* his wife, who should be living at the decease of their mother. The testator died on the 15th of September 1830. *Ann Grissell* and her husband survived him, and had eight children living at his death, namely *Thomas*, *James*, *Charles*, *Mary* the wife of *Samuel Morton Peto*, *Hannah*, *Elizabeth*, *Henry* and *Martin*. On the 25th of April 1832, (at which time *Thomas* had two children, and *Elizabeth*, *Henry* and *Martin* were infants, and *James* and *Charles* were resident in *India*,) an indenture was made or expressed to be made between *Thomas*, *James*, *Charles* and *Hannah* and Mr. and Mrs. *Peto* of the first part, *Elizabeth*, *Henry* and *Martin* of the second part, the two children of *Thomas*, both of whom were infants, of the third part, and *Henry Moon* of the fourth part, whereby, after reciting the testator's will, and that it had been agreed between *Thomas Grissell* and his brothers and sisters and Mr. *Peto*, that, in case *Thomas* or any or either of his brothers or sisters, should die before their mother

1849.

PETO v. PETO.

leaving any lawful child or children, such child or children should stand *in loco parentis*, and take their parents' share of the testator's residuary personal estate, equally between them: and that *Thomas Grissell* and his brothers and sisters and Mr. *Peto*, being very desirous that not only the two children of *Thomas*, but all his other children thereafter to be born, should, in the event of his death and of his brothers and sisters surviving their mother, become entitled to the share and interest, which *Thomas* would then have become entitled to receive, of the testator's residuary personal estate, in case he had survived his mother, had accordingly consented and agreed to confirm such desire by the now stating indenture, and to enter into a covenant, according to their then or future rights and interests under the testator's will, for carrying the same into effect: it was witnessed that, in pursuance of and for effectuating the recited agreement, and in consideration of the natural love and affection which the brothers and sisters of *Thomas Grissell* and which Mr. *Peto* bore to the two children of *Thomas*, and of ten shillings paid by *Moon*, *Thomas* and his brothers and single sisters, *severally and respectively* and for their several and respective heirs, executors and administrators, and Mr. *Peto*, for himself, his heirs, executors and administrators, and for his wife, did, and every of them did, jointly and severally, covenant with *Moon*, his executors and administrators, according *to the respective rights, shares and interests*, either present or future, which they, the covenantors, parties thereto of the first and second parts, or any or either of them, could or might have, in * the residuary bequest under * the testator's will, of and in his residuary personal estate, but not further or otherwise, that the two children of *Thomas Grissell*, and all and every other his child or children thereafter to be born, or such of

* *Sic.*

1849.

PETO v. PETO.

them as should be living at the death of *Ann Grissell* (provided *Thomas Grissell* should be then dead) should have, possess and become entitled to and receive, in equal shares and proportions, such a distributive share and interest of the testator's residuary personal estate, as *Thomas Grissell* would have had or become entitled to, in case he had survived *Ann Grissell*, and had acquired a vested interest in such residuary personal estate under the testator's will: and that Mr. *Peto* and the brothers and sisters of *Thomas Grissell*, and their respective executors and administrators, *and each and every of them*, would, at any time or times thereafter, upon the request of either of them, and at the costs and charges of the whole equally, make, do and execute, or cause and procure to be made, done and executed all such further acts, deeds, matters and things which might be considered and found necessary for the purpose of carrying the intention of the covenantors, parties thereto of the first and second parts, into effect and execution according to the true intent and meaning of the now stating indenture: provided always, and it was thereby declared and agreed, by and between all the parties thereto, that the covenant thereinbefore contained was only to extend or be construed to extend to such a proportionate part of the rights, shares and interests of *Thomas Grissell* and his brothers and sisters and Mr. *Peto* in the testator's residuary personal estate, *as would make up a full share therein to the two children of Thomas*, and all and every other his child and children in case he should not survive his mother. And the indenture moreover witnessed that, in further pursuance of and for further effectuating the recited agreement and intention of *Thomas Grissell* and his brothers and sisters and Mr. *Peto*, and for the consideration aforesaid, *Thomas Grissell* and his brothers and sisters and Mr.

1849.

PETO v. PETO.

Peto, for themselves, severally and respectively, and for their several and respective heirs, executors and administrators, did mutually covenant, every of them to and with the others and other of them, his and her executors and administrators, reciprocally, that, in case of the death of *Thomas Grissell*, or any or either of his brothers and sisters, in the lifetime of their mother, leaving any lawful child or children them surviving, such child or children should have and be entitled to the share or shares, of his, her or their parent or parents, of and in the testator's residuary personal estate, in such and the same manner, and in such and the same shares and proportions as if such parent or parents had survived *Ann Grissell*, and thereby become entitled to the distributive share and shares of the residuary personal estate bequeathed to *Thomas Grissell* and his brothers and sisters by the testator's will. It being the true intent and meaning of the persons, parties thereto of the first and second parts, that their child or children should, in the event aforesaid, stand *in loco parentis* and take their parents' share or shares equally between them.

By an indenture dated the 12th of April 1843, and made or expressed to be made between Mr. *Peto*, whose wife was then dead, *Holland Thomas Birkett*, who was then married to *Hannah Grissell*, and *Thomas*, *James*, *Charles*, *Henry* and *Martin Grissell* of the first eight parts, *Thomas de la Garde Grissell* (since deceased), *Thomas Grissell* and Mr. *Peto* of the ninth part, *Thomas Grissell* and Mr. *Peto* of the tenth part, *George Tupp* of the eleventh part, and *Thomas Grissell* and Mr. *Peto* of the twelfth part: After reciting the testator's will; and that *Thomas Grissell* and his beforenamed brothers and sisters were the only children of *Thomas de la Garde Grissell* and *Ann* his wife who were

1849.

PETO
v.
PETO.

living at the testator's death; and after reciting the indenture of the 25th of April 1832; and an indenture of the 19th of June 1835, by which *Charles Grissell* assigned his part or share, or his presumptive and expectant part or share, as well original as accruing, in the two fifths of the testator's residuary personal estate, to *Thomas de la Garde Grissell, Thomas Grissell* and Mr. *Peto*, by way of mortgage; and an indenture of the 22nd of September 1840, by which *Elizabeth Grissell* assigned her part and share, or presumptive and expectant part and share, as well original as accruing, in the two fifths, subject to the indenture of the 25th of April 1832, to *Thomas Grissell* and Mr. *Peto*, in trust for her separate use; and an indenture of the 25th of November 1840, by which Mr. and Mrs. *Birkett* assigned Mrs. *Birkett's* part or share, or presumptive and expectant share in the two fifths, to *Thomas Grissell* and Mr. *Peto*, by way of mortgage; and an indenture of the 8th of February 1842, by which *Henry* and *Martin Grissell* assigned their parts or shares, or part or share, present and future, and vested or contingent, in the two fifths, to *George Tupp* by way of mortgage: and after reciting that the indenture of the 25th of April 1832 *had never been executed by James, Henry* and *Martin Grissell*, although it had been executed by all the other parties thereto; and that Mrs. *Peto* had left four children; and that *Thomas Grissell* had had three children born since the date of the indenture of 1832; and that, for obviating any inconvenience, doubt or question which might arise from that indenture not having been executed by *James, Henry* and *Martin Grissell*, or from the same indenture having been executed by Mrs. *Peto* while she was under coverture; and, for ratifying and confirming the arrangement intended by the said indenture according to the meaning of the said parties, they, the several parties to the now stating

1849.

PETO v. PETO.

indenture of the first eight parts, according to their several and respective interests or ownerships, and with the privity and approbation of the several other parties thereto so far as they respectively could or might be interested, had determined to enter into the covenants and provisions on their respective parts thereinafter contained: it was witnessed that, in pursuance and performance of the recited determination, each of the several parties thereto of the first eight parts (except Mrs. *Birkett*) did *for himself and herself*, and his or her heirs, executors and administrators, and, as to and concerning, only, *the acts, deeds and defaults of himself and herself respectively*, and his and her respective heirs, executors and administrators; and Mr. *Birkett*, as to the acts, deeds and defaults of his wife, her executors or administrators, (with the privity and approbation of the several other parties thereto, *so far as they respectively could be in anywise interested*,) did covenant with the others of them, the several parties thereto of the first eight parts, their executors and administrators, jointly, and with each other of them the parties thereto of the first eight parts, and his and her heirs, executors and administrators, *severally*, in manner following; that is to say, that, (by way of ratification and confirmation of the arrangement made or intended by the indenture dated the 25th day of April 1832, and notwithstanding the trusts and provisions of the testator's will) upon the decease of *Ann Grissell*, the residuary estate* of the testator should be divided into as many shares as should be equal to the number of the children of *Ann Grissell* as *should be living at her death, and of her children who should have died in her lifetime but have left any child or children him, her or them respectively surviving, and including, in such number, *Mary* the deceased wife of

* *Sic.*

* *Sic.*

1849.

PETO v. PETO.

Mr. *Peto*, and so that one of such shares should be allotted and belong to each or either of the children of *Ann Grissell* who might be living at her death, and so that one of such shares might be allotted in respect of each or either of the children of *Ann Grissell* who might have died in her lifetime and might have left any child or children, him, her or them respectively surviving; and so that the child or children of each or either child of *Ann Grissell* who might so die in her lifetime but have left any child or children as aforesaid, (including the child or children of *Mary Peto*,) respectively, might take *per stirpes* and not *per capita*, and only in respect of her, his or their then deceased parent respectively, and also might take equally between and among themselves, and as tenants in common if more than one: And furthermore that each of them the parties thereto of the first eight parts, and his and her respective heirs, executors and administrators, should and would, from time to time and at all times thereafter, upon the request and at the costs and charges of each, any or either of the other parties thereto of the first eight parts, his, her or their respective heirs, executors or administrators, or of any person or persons entitled or claiming to be entitled under or by means of the arrangenent thereby made or intended, make, do and execute, or cause or procure to be made, done and executed, all such further and other lawful and reasonable acts, deeds, assignments and assurances for effecting or perfecting, ratifying and confirming the arrangement then made or intended to be made, as, by the other or others of the parties thereto of the first eight parts, his, her or their executors or administrators, or other the person or persons entitled or claiming to be entitled as aforesaid, or his, her or their respective executors, administrators or assigns, or their or her*

* *Sic.*

1849.

PETO v. PETO.

respective counsel in the law, should be lawfully or reasonably advised or required.

The last-mentioned deed was executed by Mr. *Peto* and Mr. *Birkett*, and by *Thomas*, *Henry* and *Martin Grissell*: but *James Grissell*, who was alleged not to have returned to *England* since the date of that deed and to be out of the jurisdiction of the Court when the bill was filed, never executed it.

Ann Grissell, the wife of *Thomas de la Garde Grissell*, died on the 28th of July 1847.

Bill.

In April 1848 the bill was filed by Mrs. *Peto's* four children, all of whom were infants, against their father, and *Thomas*, *Charles*, *Elizabeth*, *Henry* and *Martin Grissell*, Mr. and Mrs. *Birkett*, *George Tupp* and *James Grissell*. It stated that, at the date of the indenture of family arrangement of the 25th of April 1832, it was hoped and expected by *Thomas Grissell*, Mr. and Mrs. *Peto* and Mrs. *Birkett*, who was then single, that *James* and *Charles Grissell*, when they should be apprized of the same arrangement, and that *Elizabeth*, *Henry* and *Martin Grissell*, when they should attain twenty-one, would confirm it, and would agree to enter into the same family arrangement as regarded their shares of the testator's residuary estate; and that it was the full intention of *Thomas Grissell*, Mr. and Mrs. *Peto* and Mrs. *Birkett* that the several parties who should execute that indenture, *should be bound by the same, as to their respective shares of the estate, whether that indenture should or should not be executed by all the children* of *Thomas de la Garde Grissell* and *Ann* his wife: that *Thomas Grissell*, Mr. and Mrs. *Peto* and Mrs. *Birkett*, executed the last-mentioned deed on

1849.

PETO v. PETO.

or about the day of its date; that *Charles Grissell* executed it on the 19th of June 1835, when he had returned from *India*; and that *Elizabeth Grissell* executed it on the same day, being some time after she had attained twenty-one; but *James* never executed it: that, in April 1843, it was hoped and expected that *James*, who was then in *India*, would join in confirming the family arrangement, *though he had before refused to do so*; and that the indenture of the 12th of that month, was executed by Mr. *Peto*, Mr. *Birkett* and *Thomas*, *Henry* and *Martin Grissell*; but that *James* had not executed it; and that *Thomas*, when he executed it, knew that *James* had refused to enter into the arrangement: *that the Defendants alleged that the family arrangement was not binding upon them, because* James *had not executed the deeds of April* 1832 *and April* 1843; *but the Plaintiffs charged that the parties who did execute those deeds were bound by the family arrangement, as regarded their respective shares of the testator's residuary estate, notwithstanding* James *had not executed them.*

The bill prayed that the rights of all parties in the two fifths of the testator's residuary personal estate bequeathed to the children of *Thomas de la Garde Grissell* and *Ann* his wife, might be ascertained and declared; and that it might be declared that *James Grissell*, on the death of *Ann Grissell*, became entitled to one seventh of the two fifths;* and that the remain-

* It will be seen, on referring to the argument, that Mr. *James Parker*, one of the Plaintiffs' Counsel, contended that the Plaintiffs were entitled, not to one seventh, but to six fifty-sixths of the two fifths of the testator's residuary estate; as that apportionment would leave *Thomas*, *Charles*, *Elizabeth*, *Hannah*, *Henry* and *Martin Grissell*, and Mrs. *Birkett*, seven

ing six sevenths became, under the will and the deeds of family arrangement, divisible into seven equal parts, and that the Plaintiffs, as the children of Mrs. *Peto*, were entitled to one of such seven parts; and that it might be declared that *Thomas Grissell* and Mr. *Peto* (who were the executors of the will) held the six sevenths of the two fifths, as trustees for the Plaintiffs and the Defendants *Thomas*, *Charles*, *Elizabeth*, *Henry* and *Martin Grissell*, and Mr. and Mrs. *Birkett* and those claiming under them; or that the Court would declare who were entitled, and in what proportions, to the two fifths of the testator's residuary estate.

Answers.

The answers of Mr. *Peto* and Mr. and Mrs. *Birkett* submitted the question, raised by the bill, to the judgment of the Court.

The answer of *Thomas*, *Charles*, *Elizabeth* and *Martin Grissell*, stated that it was part of the agreement for the family arrangement mentioned in the bill, that *all* the children of *Thomas de la Garde Grissell* and *Ann* his wife, should agree to and be bound by it; and that, as *James Grissell* always declined to be a party to the arrangement, the proposed agreement was never finally come to.

That answer, however, contained an admission, on the part of *Thomas Grissell*, that *he* executed the deed of the 12th of April 1843 after he knew that *James* had refused to enter into the arrangement.

---

fifty-sixths, or one eighth each, and would leave *James* the like share and also the one seventh of seven fifty-sixths which accrued to him on Mrs. *Peto's* death. That apportionment would take nothing at all from *James*, and nothing more from his brothers and sisters than they were bound by the deeds (as Mr. *Parker* contended) to give up.

1849.

PETO
v.
PETO.

Argument for Plaintiffs.

Mr. *Bethell* and Mr. *Piggott*, for the Plaintiffs, said that the true construction of the deeds was that every party who executed them should be bound by the arrangement, whether the other parties did or did not execute them; *Bidwell* v. *Lethbridge* (*a*), *Collins* v. *Prosser* (*b*); and that, if the parties had not intended that the deeds should have that effect, they would not have executed them so soon after the testator's death; but would have waited until those who were abroad had returned to *England*, and those who were infants had attained twenty-one; that, though *Henry* and *Martin* had not executed the deed of 1832 they had executed the deed of 1843, and thereby had ratified and confirmed the former deed.

Mr. *James Parker*, who was with Mr. *Bethell* and Mr. *Piggott*, said:

As *James Grissell* never executed either of the deeds, I admit that he is not bound by them; but, I submit that his brothers and sisters are bound by them, for all of them executed one or other of the deeds, and some of them executed both: and the consequence is that the Plaintiffs are entitled to six fifty-sixth parts of the share of the testator's estate which was given, by the will, to the children of *Ann Grissell* who should be living at her death (*c*).

The deed of 1832 recites that it had been agreed, between the children of *Ann Grissell*, that, in case any of them should die before their mother leaving any law-

(*a*) 1 Barnardist. 235.
(*b*) 1 Barn. & Cress. 682.
(*c*) According to the bill, the Plaintiffs were entitled to *one seventh* of the share of the testator's residuary estate.

1849.

PETO v. PETO.

ful child or children, such child or children should stand *in loco parentis* and take their parents' share. Now the share of the parents was one eighth; and, therefore, if all the children of *Ann Grissell* had executed the deeds, the children of Mrs. *Peto* would have been entitled, in the event that has happened, to one eighth: but as *James* did not execute the deeds, the children of Mrs. *Peto* are entitled to one eighth *minus* one seventh. For each of the other children of *Ann Grissell*, as he or she executed the deeds, gave up one seventh of an eighth, or one fifty-sixth, to the children of Mrs. *Peto*; and, as six of those children executed one or other of the deeds, the children of Mrs. *Peto* are entitled to six fifty-sixths.

Thomas Grissell, though he now insists that the deeds are not binding upon him, seems to have stipulated that a special clause should be inserted, in the deed of 1832, in favour of his children; and accordingly he and his brothers and sisters are made to covenant for themselves *severally and respectively*, and for their *several and respective heirs*, &c. and according to their *respective rights, shares and interests*, that, if *Thomas* should die in his mother's lifetime, his children should have the share of the testator's estate which he would have been entitled to if he had survived his mother. Then there is a covenant for further assurance; and, after that, a proviso that the first covenant is to extend only to such a proportionate share of the rights, shares and interests of *Thomas* and his brothers and sisters, as would make up a full share to his children. The second witnessing part of the deed provides for the children of the brothers and sisters of *Thomas* who might die in the lifetime of *Ann Grissell*; and, there too, *Thomas* and his brothers and sisters are made to covenant *severally and respectively*, and *each with the others and other of them*, reci-

1849.

PETO v. PETO.

procally: therefore it is quite clear that that covenant operates, severally, upon that proportion of Mrs. *Peto's* presumptive share, which, under the will, would have come, to each of the covenanting parties, on her death.

The *Vice-Chancellor.*—Is there a proviso that, in case the deed should not be executed by all, it should not take effect as to any of the parties?

Argument resumed.—There is no such proviso: and, therefore, I submit that there can be no doubt upon the question. Besides, it is impossible to suppose that the parties who were adult and in this country at the date of the deed, would have executed it until those whom they knew to be infants and abroad were capable of executing it, unless they had meant their own shares to be bound in all events, and to give effect to the arrangement as far as they could. And I submit that, for the reasons which I have stated, the proposition which the Counsel for the Defendants will contend for, namely, that the deed is abortive, because one of the persons named as a party did not execute it, is wholly untenable.

I will not occupy the time of the Court by going through the deed of 1843: I shall make only one observation upon it, which is, that it carries out the principle of the deed of 1832 in every respect.

Argument for Defendants.

The *Solicitor-General,* for *Thomas, Charles, Elizabeth, Henry* and *Martin Grissell,* said:

Supposing that *Henry* and *Martin* had executed the deed of 1832, and that Mrs. *Peto* had been *sui juris* when she executed it, we submit that the Court could not

1849.

PETO v. PETO.

have given effect to it. That instrument, though under seal, was nothing more than an executory contract; and therefore, the Court, if it cannot give effect to it precisely according to its terms, cannot give effect to it at all. Now, what that deed provided was that, if *Thomas Grissell* or any of his brothers or sisters should die in the lifetime of their mother leaving a child or children, such child or children should stand *in loco parentis* and take their parent's share; which, as there were eight children of *Ann Grissell*, was one eighth. But, as one of those children has refused to be bound by the deed, the fund has become divisible, not into eighths, but into sevenths; and consequently the Court cannot give effect to the contract. The bill asks, not that the Plaintiffs may be declared to be entitled to the share provided for them by the contract, but that they may be declared to be entitled to one seventh of six sevenths, or one forty-ninth, instead of six forty-eighths; and Mr. *Parker* has contended that they are entitled to six fifty-sixths; which is asking, in effect, that the contract may be executed *cy pres*. But the Court never executes a contract in that manner; it executes it precisely as it is expressed, or not at all. It is to be observed also that one object of this deed was to secure one eighth to each of the children of *Ann Grissell* who should survive her; but, in the event that has taken place, the surviving children of *Ann Grissell* take less than one eighth. That *that* was one object of the deed, appears from what may be called the operative recital, namely, that the eight children had agreed that, in case any or either of them should die, before their mother, leaving any lawful child or children, then such child or children should stand *in loco parentis* and take *their parents' share* equally between them. That recital shows that the parties intended that, on the death of *Ann Grissell*, such of them as should sur-

1849.

PETO v. PETO.

vive her should take one eighth each. But one of the children says that he will have nothing to do with the contract; and, therefore, it cannot be carried into effect. Suppose that all the children, except *James* and *Thomas*, had died, in their mother's lifetime, leaving children, then, in consequence of *James's* refusal, the fund would have been divisible, on her death, into halves; and *James* would have taken the whole of his half; but, according to the prayer of the bill, *Thomas* would have had to pay seven eighths of his half, to the children of the deceased children. What is there in the contract to lead to such a result? The contract was entered into on the assumption that all the eight children would concur in it. But one of them says that he will not concur; and, therefore, it has become wholly abortive; for it cannot be fully enforced without his concurrence, and the Court will not enforce it in part. Besides Mrs. *Peto* was not bound by the contract; for her interest in the fund was contingent and reversionary; and, therefore, no act that her husband could do, could bind it; and, as she was a married woman, her execution of the deed was a nullity. If she had survived him, she might have said, as *James* does, that she would have nothing to do with the contract; and yet it is her children who are seeking the benefit of it. As far as they are concerned, the deed is purely voluntary; and, therefore, a Court of Equity will not interfere on their behalf. If *James* had died in his mother's lifetime and left children, they would have had an equal right to enforce the contract.—In making the foregoing observations I have assumed that the deed of 1832 was executed by all the eight children except *James*; but the fact is that it was executed by only five of them; and the execution of one of those five was invalid. Two of the non-executing parties are my clients: how can they be bound by a deed which they never executed?

1849.

PETO v. PETO.

It is true that they did execute the deed of 1843; but that deed was not made for the purpose of confirming the prior one: it was an entirely new contract, made between different parties and under different circumstances. Mrs. *Peto* was then dead: and, as her share accrued, on her death, to her surviving brothers and sisters, the division into eighths, which the first contract contemplated, could no longer take place; and, therefore, that contract was, necessarily, at an end. If it was not a new contract, why was a new deed prepared: why did not *Henry* and *Martin* execute the old deed, as *Charles* and *Elizabeth* had done? But they did not, nor did Mrs. *Birkett* execute the new deed; and, if she had executed it, her execution would have gone for nothing.—Every observation that has been made with respect to the old deed, applies to the new one. It was executed by only three of the children; the Court cannot give effect to it *cy pres*; it was made on the assumption that all the children would concur in it; and it is sought to be enforced by persons from whom no consideration flowed; for they had nothing whatever to give up. At all events, the Court has no power to amalgamate the two deeds and say that, together, they form one contract.

Mr. *Follett*, who was with the *Solicitor-General*, said:

It is quite clear that the intention of the parties was that, unless the first deed should be executed by all the children of *Ann Grissell*, it should not be binding upon any of them. But though that, I think, is indisputable, the deed appears not to have been prepared with much consideration; for Mr. *Peto*, instead of covenanting for himself, as he is made to do by the second witnessing part, ought to have covenanted for his wife; for, as her

1849.

PETO v. PETO.

interest in the two fifths of the testator's residuary personal estate, was reversionary, he could take nothing in the event provided for. The covenant too is expressed so as to include his children by any future wife or wives; which must have been a mistake. But, whether it was or not, it is manifest, from the recital that *all* the children of *Ann Grissell* had agreed that if any of them died in her lifetime leaving children, their children should stand *in loco parentis* and take their parent's share, that the deed was intended not to operate at all, unless all the eight children should execute it; for, in no other case, could the children of a child take their parent's share. I admit that that recital was untrue, for some of the children were abroad, and some were infants; but it shows that the proposed arrangement was intended to take effect in case, and only in case, all the children, on being consulted and becoming competent to bind themselves, should concur in it and execute the deed. And the second witnessing part of the deed affords additional evidence that such was the intention: for it purports to make the children covenant each with the others and other of them, mutually and reciprocally; therefore, each and every child was intended to be both a covenantor and covenantee, and the share of each and every of them was meant to be operated upon.

The arrangement intended to be carried into effect by the deed of 1843, was a new arrangement. If it was not, there was no necessity for a new deed; or for the parties to the old deed being made parties to it. It is evident, however, that, like the old deed, it was not intended to be binding upon any of the persons named as parties, unless all of them executed it. But, supposing that the new deed was meant to carry out the arrangement intended to be

made by the old deed, and to be binding, in all events, upon the parties who should execute it; the children of Mrs. *Peto*, who are the only Plaintiffs on this record, are entire strangers to it. The contract which they are seeking to enforce, could not have been enforced against them, nor could it have been enforced against their mother, under whom they claim: therefore there is no mutuality between them, nor was there any mutuality between their mother and the parties against whom they are seeking a performance of the contract.

The *Vice-Chancellor*.—Mrs. *Peto's* share was not bound by either of the deeds; therefore, nothing was given by her; and nothing could have been given by her children, for they are infants.

Mr. *Rolt* and Mr. *Willcock* appeared for Mr. *Peto*, and Mr. and Mrs. *Birkett*, but did not take any part in the argument.

Mr. *Toller* appeared for *George Tupp*, and opposed the claim made by the bill, on the same grounds as the *Solicitor-General* and Mr. *Follett* had done.

Mr. *James Parker*, in reply.—The argument for the Defendants is inconsistent with itself. It admits that the deeds would have been operative if *James* had executed them; but contends that, if he had executed them, the Plaintiffs could not have enforced them. Reply.

The parties to the deeds, knowing that Mrs. *Peto's* interest could not be bound because it was reversionary, were contented with her husband covenanting on her behalf. His covenant was the valuable consideration given for the covenants entered into, with him and his

1849.

PETO v. PETO.

wife, for the benefit of their children; and the children are entitled to sue as the *cestuis que trust* of those covenants.

The effect of the contract contained in the deeds, has been misrepresented. It does not, nor was it intended to secure one eighth, and only one eighth, to each of the parties who might survive *Ann Grissell*, and to the children of those who might die in her lifetime; but, as the shares of the parties were subject to variation so long as *Ann Grissell* lived, it secures, to the children of a child of *Ann Grissell*, in case the child should die in her lifetime, the share which the child was entitled to at his or her death, whether that share was an eighth or more than an eighth. For instance, if six of the children of *Ann Grissell* had died in her lifetime, without issue, and then another had died leaving children, those children would have taken one half, and the surviving child would have taken the other half. It is true that, on account of *James's* refusal to accede to the arrangement, the deeds cannot have their full effect; but, as the covenants contained in them are several and reciprocal, each of the parties who did accede to the arrangement, is bound to give effect to it so far as he can; that is to say, he is bound to relinquish, in favour of the Plaintiffs, the increment which accrued to him on Mrs. *Peto's* death. That is all that is asked for them at the bar. The bill, certainly, asks for more; but, at the same time, it prays that the rights of the Plaintiffs may be ascertained and declared.

It was said that there was a discrepancy between the provisions of the first and the provisions of the second deed; and it was asked, if there was not, what necessity was there for a second deed? The

1849.

PETO v. PETO.

answer is that *Henry* and *Martin* not only had not executed the first deed, but had mortgaged their shares to Mr. *Tupp*; and it was necessary that, as regards them, there should be a new deed showing Mr. *Tupp's* interest.

The *Vice-Chancellor*.—That deed proceeds on the assumption that the first deed was invalid.

Reply resumed.—It proceeds on the ground, not that the first deed was invalid, but that it had not been executed by some of the parties; as appears from the last recital in it. That recital shows also, and the operative part expresses that that deed was made for the purpose of ratifying and confirming the arrangement made or intended to be made by the first deed; and the effect of it is precisely the same as the effect of the first deed. It secures to the children of a child of *Ann Grissell*, who might die before her, the share which that child might be entitled to at its death, (whether that share was an eighth, a seventh or a sixth,) in consideration of the covenant, entered into by that child with each of the other children, to relinquish the benefit of survivorship in favour of their children.

The *Vice-Chancellor*.—No consideration moved from the children.

Reply resumed.—That observation applies to the children of each of the parties, as well as to children of Mrs. *Peto*. No consideration moved or could move from them. It moved from their parents; every one of whom, as he or she executed either of the deeds, entered into a covenant with each of the others, by which he or she made a concession, and thereby became a purchaser, for

1849.

PETO v. PETO.

his or her children, of the covenant which each of his brothers and sisters entered into with him: for, as I before observed, the parties covenanted with each other, mutually and reciprocally, therefore each of them was a covenantor as well as a covenantee; and there is no want of consideration.

It was said that the contract, in this case, was merely executory; but that is not so: it was executed as far as the nature of the subject, (which was an equitable contingent interest,) would admit of. The division of the fund is the only thing that remains to be done. The rights of the parties have been determined as conclusively as they would have been if they had been made the subject of an assignment, or of any other deed that the most skilful conveyancer could have prepared.

In conclusion, I submit, first, that, as the deeds contain as many covenants, each separate and distinct from the other, as there were children of *Ann Grissell*, all her children who executed the deeds are bound by them, notwithstanding there was one non-executing child: secondly, that each of those contracts is supported by a valuable consideration: thirdly, that the Plaintiffs are entitled to the benefit of the contracts made with their father, and that the effect of them is to give, to the Plaintiffs, the one seventh of an eighth, which accrued to the executing children on Mrs. *Peto's* death.

The VICE-CHANCELLOR:

Judgment.

I am quite clear that the construction of the deeds, which the Plaintiffs' Counsel have contended for, is not the proper construction. It seems to me to be perfectly plain, on looking at the deeds, that they were made upon the supposition that all the children of *Ann Grissell*

would ultimately concur in the intended arrangement; and I infer, from the mode in which the claim on behalf of the Plaintiffs, has been made in Court, that their Counsel feel that the deeds were made upon that supposition.

The language of the first deed is, merely, a declaration that, if any one of the eight children of *Ann Grissell* should die in her lifetime leaving children, the children of the child so dying, should stand *in loco parentis* and take their parent's share. And the same thing is, in effect, asserted by the language of the second deed. I can see no substantial difference between them. Is it not clear, therefore, that what the parties contemplated was this; that, in the event of any of the children of *Ann Grissell* dying before her and leaving children, those children should represent and take the share of their parent. Now what was the parent's share? Each parent's share was one-eighth. It is not pretended to be said that that is the construction which, under the existing circumstances, is to be put on the words; because the Plaintiffs are willing to take, from those six children who executed the deed and survived *Ann Grissell*, that portion of an eighth which each of those six children has become entitled to in consequence of Mrs. *Peto* having died before *Ann Grissell*; and therefore the Plaintiffs are contented to take what, in the aggregate, is not commensurate with an eighth. But the Plaintiffs, if they are entitled to anything, must be entitled to one-eighth. In consequence, however, of *James* not having executed either of the deeds, they cannot take one-eighth, without trenching upon the original shares of those six children of *Ann Grissell* who executed the deeds. But it would be absurd to suppose that, as the parties were evidently contemplating a scheme of equality,

1849.

PETO v. PETO.

so as to preserve an equal division in the case of one of them dying before *Ann Grissell*, by continuing the share of the child so dying to the children of that child—it is absurd to suppose that any one of the contracting parties meant to put himself or herself in a worse situation than that child or the children of that child. There is nothing whatever to countenance such a supposition. What the parties contemplated was the making of an equal division, by continuing the share of the deceased child to the children of that child; but not that they themselves should be in a worse situation. It is evident, therefore, from the first deed alone, that the concurrence of *James* was looked to.

Then, after eleven years had elapsed without *James* having executed the first deed, the second deed was prepared, and he was made a party to it. Why was that done, except because his execution was still felt to be necessary in order to complete the arrangement? But he never executed that deed; and, therefore, there is not the slightest ground for the claim made by the Plaintiffs.

Bill dismissed with costs.

Potter v Baker 13 Beav. 275. & 15 id. 491.
Mountcashell v Campbell 25 Beav. 546; 3 Dey. & J. 234.

YATES *v.* MADDAN.

1849:
24th April.

Annuity.
Sterling or currency.
Legacy.
Will.
Construction.

THOMAS LEGAL YATES of *Kingston* in *Jamaica*, made his will dated the 18th of July 1832, and thereby, after manumitting two of his slaves and bequeathing his plate, and library, to his brothers, expressed himself as follows:

"I direct that all my just debts and funeral charges and expenses be fully paid and satisfied by my executrixes and executors hereinafter named or such of them as shall qualify and act under this my will, as soon as conveniently can be after my decease: and I hereby subject and make liable all my estate whatsoever and wheresoever to the payment thereof. I give, devise, and bequeath unto my son *Edward Cookson Yates*, *one clear annuity of* 100*l.* *per annum* for and during his natural life: and, should he die, a child him surviving, I continue *the same annuity* for such child's use and benefit, to be paid to his or her mother. I continue the charity which I have been allowing Mrs. *Catherine Griffiths*, widow of the late *William Griffiths*, of 100*l.* *sterling*, payable quarterly in *London*; which *annuity* I direct to be paid and continued, quarterly, during her natural life. I give and bequeath unto my sister, *Eliza Pellew Mowbray*, 100*l.* *sterling per annum*, for and during her natural life: I give and bequeath unto each of my sisters, named *Mary Ann Yates* and *Frances Beckford Yates*, the sum of 50*l.* *sterling per annum* during their

A testator domiciled in *Jamaica*, gave to his son, "one clear annuity of 100*l.* *per annum*, for and during his natural life, and, should he die, a child him surviving, I continue the same annuity for such child's use and benefit, to be paid to his or her mother:" the testator then gave two annuities of 100*l.* *sterling*, to two other persons; and bequeathed his residuary estate to his executors, in trust, amongst other things, to pay the several legacies and annuities before given by him.

Held that the annuities given to the son and his child were to be paid in *Jamaica* currency and not in sterling; and that the child's annuity was a perpetual one.

1849.

YATES v. MADDAN.

respective natural lives. It is my will and desire that my trustees and executors hereinafter named, or such of them as shall qualify and act, do keep up and preserve the complement of negroes now employed on his Majesty's navy yard, under contract, by purchasing others in the room of such as may die or be discharged. All the rest, residue and remainder of my estate, real, personal or mixed, whatsoever and wheresoever, I give, devise and bequeath the same to my wife, *Dorothy Diana Yates*, to my daughter, *Mary Ann Morier Yates*, to my copartner and friend *James Cockburn*, to my friends *James Minot* and *Barnaby Maddan*, both of the city and parish of *Kingston*, Esqrs., or such of them as shall qualify and act under this my will, and the survivors and survivor of them, and the executors or administrators of the survivor, upon trust to uphold and keep up my plantations and the complement of negroes now employed at his Majesty's naval yard, by purchase of other negroes in room of such as may happen to die or be discharged from his Majesty's naval yard: in the next place, *to pay, satisfy and discharge the several legacies and annuities hereinbefore given*, devised and bequeathed; and then to pay and apply the residue of such personal estate; and all the real estate and the rents, issues and profits thereof, unto and among my said wife, *Dorothy Diana Yates*, and my several children named respectively, *Mary Ann Morier Yates*, *Frances Beckford Yates*, *Elizabeth Proctor Swiney Yates*, *Henrietta Brown Yates*, *Emily Yates*, and *Robert Clement Yates*, equally, share and share alike, upon the males attaining the age of twenty-one years, and the females, upon attaining that age or being married with their mother's consent, or the survivors or survivor of them, and to the issue of such of my said last-named children as may die having married with their mother's

consent; such issue only taking the part or share, his, her, or their parent or parents was or were entitled to, *per stirpes* and not *per capita*; to hold to them and their respective heirs as tenants in common and not as joint-tenants. I hereby nominate, constitute and appoint my before-named trustees, executrixes and executors of this my last will and testament."

In 1833 the testator left *Jamaica* and came to *England*. Afterwards, he purchased an estate in *Hampshire*, called *Brockhurst Lodge*. In 1835 he made two codicils, both of which were dated from that place.—By one of them, he revoked, "the annuity" given, by his will, to *Catherine Griffiths* and the bequests of his plate and library: and, by the other, he reduced the annuities given to his sisters, in consequence of the great change in *West Indian* affairs. He died in *England*, a few months after the date of the latter codicil; and his widow and daughter, *Dorothy Diana Yates* and *Mary Ann Morier Yates* and *Barnaby Maddan* proved his will and codicils in *England*; and *Dorothy Diana Yates* and *James Cockburn* proved them in *Jamaica*.

Edward Cookson Yates was resident in *Jamaica* at the date of the will, and continued to reside there until his death. He died, intestate, in August 1840, leaving a widow, and an infant daughter who was his only child. His widow took out administration to him. The testator's executors in *Jamaica*, paid him his annuity of 100*l.*, *in the currency of that Island*, out of the proceeds of the testator's property there; and, after his death, they paid the annuity, in like manner, to his widow for the benefit of his child.

In July 1847, his widow and child (who were then

1849.

YATES v. MADDAN.

in *England*) filed a bill against the executors, alleging that the annuities given to *Edward Cookson Yates* and his daughter ought to have been paid *in sterling British money*, and that the daughter's annuity was *a perpetual one*. The bill prayed for an account of the arrears due to *Edward Cookson Yates* at his death, in respect of his annuity; and that the Defendants might be decreed to pay the amount, to his widow, out of the testator's personal estate: and that an account might be taken of the arrears due in respect of the daughter's annuity, and that the Defendants might be decreed to pay the amount to the widow for the benefit of her daughter; and that it might be declared that, according to the true construction of the will, those two annuities were annuities of 100*l. sterling*, and that the daughter's annuity was a perpetual one; and that the widow and daughter were entitled either to have 3333*l.* 6*s.* 8*d.* Consols transferred by the Defendants, out of the sum of 18,000*l.* of like stock (which was standing in the names of the Defendants and was part of the produce of the testator's personal estate) into the name of the widow as a trustee for the daughter, or to have that sum set apart and appropriated as a fund for payment of the annuity.

Mr. *Rolt* and Mr. *E. F. Smith*, for the Plaintiffs, said that, in construing the will, regard must be had to the domicile of the testator *at his death*;* at which

* The answers of two of the Defendants denied that the testator came to *England* with the intention of permanently residing there; and the evidence in favour of his having been domiciled in *England* at his death, was not conclusive. It showed, merely, that the testator *resided* in *England*, with his wife and family, from his arrival there until his death. That he was domiciled in *Jamaica* when he made his will, was not disputed.

time the will spoke and took effect; that, the testator was domiciled in *England* at his death, and, therefore, he must be considered as speaking of sterling money throughout his will: *Story's* Conflict of Laws, 675, sect. 473; *Price* v. *Dewhurst* (*a*), and *Anstruther* v. *Chalmer* (*b*): that, all the annuities given by the will, except those in question, were given, expressly, in pounds sterling: that it was not reasonable to suppose that the testator intended to give pounds of one value to one person, and pounds of a different value to other persons: that, if he had meant to give something different to his son from what he had given to the other persons named in his will, namely currency instead of sterling, he would have used the word, 'currency' in the gift to his son; and that as he had directed all the annuities, except one, to be paid in sterling, and had not directed that that one should be paid otherwise, the Court was bound to infer that he meant that one also to be paid in sterling, and had omitted the word, 'sterling,' inadvertently: *Wordsworth* v. *Wood* (*c*), *Daniell* v. *Daniell* (*d*).

The VICE-CHANCELLOR:

It appears, on the face of the will, that the testator, when he made it, was living in *Jamaica* and had property there.—Then he makes his will in this manner: he first gives his son a clear annuity of 100*l. per annum.* He then directs an allowance which he had been making to a lady to be continued; and he terms it a charity of 100*l. sterling*; but, in the subsequent part of his will and in the codicil by which he revokes it, he calls it an annuity: so that he shows that he was speaking of an annuity of 100*l.* sterling. Then he gives an-

(*a*) *Ante*, Vol. VIII., page 279; and 4 Myl. & Cr. 282.

(*b*) *Ante*, Vol. II., page 1.

(*c*) 4 Myl. & Cr. 641; see 646.

(*d*) 6 Ves. 297.

1849.

YATES v. MADDAN.

other annuity of 100*l.* sterling. So that he speaks, first, of a sum, of 100*l.* simply, and then he speaks, twice, of two sums of precisely the same amount, and uses the word, 'sterling' with reference to each of them: and, that being so, he must be taken to have meant that the first annuity should not be paid in sterling, but should be paid in currency (*e*).

Mr. *Rolt* and Mr. *E. F. Smith* then said that the Plaintiff, the daughter of *Edward Cookson Yates*, was entitled to a perpetual annuity of 100*l.*, or to such a sum of money as would produce a yearly sum of that amount; for the annuity was not given to her for her life, nor was any other period fixed for the duration of it: and that the testator, by the words, "the same annuity," meant, "the same annual sum;" and that, by the direction that it should be paid to the mother of the infant Plaintiff, he meant only that it should be paid to the mother, during the minority of the Plaintiff. They relied upon *Stokes* v. *Heron* (*f*) and, particularly, upon Lord *Cottenham's* judgment in that case. They referred also to *Robinson* v. *Hunt* (*g*), and *Tweedale* v. *Tweedale* (*h*).

Mr. *Stuart*, Mr. *Bethell*, Mr. *Hardy* and Mr. *Speed*, appeared for the Defendants, one of whom, *Dorothy Diana Yates*, was a residuary legatee under the tes-

(*e*) See *Saunders* v. *Drake*, 2 Atk. 465; *Lansdowne* v. *Lansdowne*, 2 Bligh, 60; *Holmes* v. *Holmes*, 1 Russ. & Myl. 660; and *Cope* v. *Cope*, *ante*, Vol. XV., page 118.

(*f*) 12 Cl. & Fin. 161, see 191.

(*g*) 4 Beav. 450.

(*h*) *Ante*, Vol. X., page 453.

tator's will, as well as an executrix of it. They distinguished this case from *Robinson* v. *Hunt* and *Stokes* v. *Heron* on the ground that, in each of those cases, words were used which showed, clearly, that the annuities were to be perpetual: and they contended that, in the present case, the duration of the annuity was expressly limited to the minority of the infant Plaintiff.

Mr. *E. F. Smith* replied.

The VICE-CHANCELLOR:

It struck me, during the argument, that, as the testator has used the words: "I continue the same annuity for such child's use and benefit, *to be paid to his or her mother*," he intended the annuity to be a provision for the child during its infancy only. But, on further consideration, I am of opinion that the Court ought to put a liberal construction on those words, and should hold that the testator intended by them, not to limit the duration of the annuity, but only to point out the person to whom it should be paid during the child's minority. Therefore, and as a fund is pointed out, by the residuary clause, for payment of the annuity, I am of opinion that the child is entitled to a perpetual annuity.

Declare that, according to the true construction of the will, *Edward Cookson Yates* was entitled to one clear annuity of 100*l.* *per annum Jamaica* currency, for his life, and, after his death, that the Plaintiff *Emma Elizabeth Georgiana Yates*, as the only child of *Edward Cookson Yates*, is entitled to a perpetual annuity of 100*l.* *Jamaica* currency: and order and decree the same accordingly: and order and decree that it be referred, to the *Master* of this Court in rotation, to take an account of what is due, to the Plaintiff, in respect of the

1849.

YATES v. MADDAN.

arrears of such annuity, on the footing of the said declaration, and also to ascertain what amount of Bank £3 per Cent. annuities will be sufficient to produce the said annuity.

1849: 25th April.

Articled clerk. Jurisdiction. Premium. Apprentice-fee.

An attorney, to whom a clerk was articled, died before the Articles expired.

Held that the Court had jurisdiction to order part of the premium paid to the attorney, to be repaid out of his assets.

HIRST v. TOLSON.

IN November 1845, *Sarah Hirst*, widow, articled her son, *Henry*, to *Richard Tolson*, a solicitor and attorney, for five years, and paid *Tolson* a premium of 200*l*. By the Articles, Mrs. *Hirst*, for herself, her executors and administrators, covenanted to provide her son with board, lodging and clothes; and *Tolson*, for himself, his executors and administrators, covenanted with Mrs. *Hirst* to instruct her son or cause him to be instructed in the business or profession of an attorney and solicitor which he then did or should, at any time thereafter during the term, use or practise; and, at the end of the term, to use his best endeavours to procure him to be admitted an attorney and solicitor.

In October 1847 *Tolson* died: the Defendants were his executors. After his decease, Mrs. *Hirst* applied, to a Judge at Chambers, to order the Defendants to return a portion of the premium: but the learned Judge dismissed the application, on the ground that he had no jurisdiction to make the order against the executors of an attorney. Mrs. *Hirst* and her son then filed the bill in this Cause, praying that the Defendants might be decreed to return to her a just proportion of the premium, out of *Tolson's* assets.

The Defendants stated, in their answer, that, after

Tolson's death, they arranged with a gentleman named *Clough*, whom *Tolson* had taken into partnership with him shortly before his death, to take *Henry Hirst*, as his clerk, for the remainder of the five years, without any premium; that *Henry Hirst* continued in the office for about ten days after *Tolson's* death, and then left it without assigning any reason for so doing; and that, the Defendants had since offered, but without admitting their legal liability, to refer the matter to the arbitration of any respectable solicitor; but that Mrs. *Hirst* had rejected their offer.

Mr. *Bethell* and Mr. *Rogers*, for the Plaintiffs, said that, where the master of an apprentice died during the apprenticeship, the Court of Chancery had held, from the earliest times, that his executors were bound to return a portion of the premium, and that they could not escape from that obligation by offering to provide the apprentice with a new master; *Soam* v. *Bowden* (*a*), *Newton* v. *Rowse* (*b*).

Mr. *Rogers* cited *Hale* v. *Webb* (*c*), and *Ex parte Sandby* (*d*), to show that the Court would order part of the premium to be returned, if the master became bankrupt.

Mr. *Roundell Palmer* and Mr. *Amphlett*, for the Defendants, said that the authorities referred to by Mr. *Bethell*, began with Lord *Nottingham* and ended with Lord *Jefferies*, when the law of the Court was very different from what it is now: that, in the case before Lord *Nottingham*, the contract was to provide the apprentice with diet, as well as to instruct him, and that

(*a*) Finch, 396.
(*b*) 1 Vern. 460.
(*c*) 2 Bro. C. C. 78.
(*d*) 1 Atk. 149.

1849.

HIRST v. TOLSON.

it was admitted, in that case, that the contract, so far as it provided for instruction, was determined by the death of the master: that the contract in the present case, was for instruction only: that the case before Lord *Jefferies* destroyed itself; for his Lordship gave the Plaintiff more than he had stipulated for: that there was no case, except those two, in which a Court either of Law or of Equity had interfered after the death of the master: that, in the cases referred to by Mr. *Rogers*, the master and the apprentice were, both of them, living, and the apprentice, as was the case in *Soam* v. *Bowden*, was a legal creditor for a breach of contract: that there were only three kinds of jurisdiction (besides that in bankruptcy) in cases between masters and their apprentices or clerks: first, that of Justices of the Peace under 5 Eliz. c. 4: secondly, that of the Chamberlain of London with respect to city-apprentices; and, thirdly, the summary jurisdiction exercised by the Courts of Common Law over their own officers; but there was no instance in which the Courts of Law had exercised any jurisdiction whatever except during the lives of both parties: and, lastly, that the articles in the present case contemplated and provided for the event of Mr. *Tolson* not practising during the whole of the five years.—The following cases were cited: *Ex parte Prankerd* (*e*), *Cuff* v. *Brown* (*f*), *Wadsworth* v. *Guy* (*g*), *In re Thompson* (*h*), *Baxter* v. *Burfield* (*i*), *Argles* v. *Heaseman* (*k*), and *Hale* v. *Webb*.

Mr. *Amphlett* said that it was clear, from the case in *Siderfin* (which was more fully reported in *Keble*) that

(*e*) 3 Barn. & Ald. 257.
(*f*) 5 Price, 297.
(*g*) 1 Siderfin, 216; and 1 Keble, 761.
(*h*) 1 Excheq. Rep. 864.
(*i*) 2 Ves. sen. 34, cited; reported in 2 Stra. 1266.
(*k*) 1 Atk. 518.

the Plaintiffs had no legal demand under the articles; for that case decided that a covenant which required the exercise of personal skill, was discharged by the death of the covenantor; and, as the Plaintiffs had no demand at law, they had no demand which they could enforce, in a Court of Equity, against the assets of the covenantor.

Mr. *Bethell*, in reply, said that, in *Hale* v. *Webb*, Lord *Kenyon*, M.R. considered it to be quite clear that the Court had jurisdiction to decree a return of part of the premium; for he said that, if the boy had not behaved grossly ill, he ought to have had a return of part of the money; but, if the Chamberlain had a jurisdiction and had exercised it, he would not review it; and that his Lordship dismissed the bill, *under the circumstances of the case:* that it appeared, from Keble's report of *Wadsworth* v. *Guy*, that the action in that case was brought by the apprentice against the executrix of the master, not to recover part of the premium (indeed it did not appear that any premium had been paid); but to recover damages for breach of the covenant to instruct the Plaintiff; and the Court held that the action would not lie, because a dead man could not give instruction.

The VICE-CHANCELLOR:

In this case, it is alleged that a debt has accrued to the Plaintiffs, and they are seeking to obtain payment of it *out of assets*. The case, therefore, is plainly distinguishable from the case of *May* v. *Skey* (*l*), which I decided a few days ago. In that case, a lady had advanced money to a married woman (whose husband had gone abroad and left her wholly unprovided for) to enable her to procure clothes and other necessaries; and

(*l*) *Ante*, page 588.

1849.

HIRST v. TOLSON.

the lady sued *the husband* for the money. In the course of the argument, two cases were cited in which the Court had ordered money advanced under similar circumstances, to be repaid. But, in each of those cases, the husband was dead and the suit was against his assets. In *May* v. *Skey*, however, the husband was alive, and, therefore, I held that the bill would not lie; for the Court has no jurisdiction to order a debt to be paid by the debtor himself.

In this case it appears, on the face of the articles, that there is a debt: what the amount of it is, I do not say: *that* must be determined by the Master: but, there being a debt and payment of it being sought out of the assets of a person who is dead, I am clearly of opinion that it is a case in which this Court has jurisdiction. Therefore I shall refer it, to the Master, to ascertain what part of the premium ought to be returned; and, as the Defendants admit assets, I shall order them to pay, to the Plaintiffs, what the Master shall ascertain; and to pay the costs of the suit also.*

* Affirmed in March 1850.

WARBURTON *v.* FARNELL.

1849: 28th April.

Power. Tenant for life.

The trustees of a marriage settlement were empowered to invest the trust funds in land, and, afterwards, to resell the lands, with the consent of the tenant for life. After the trustees had invested part of the funds in land, the tenant for life conveyed his interest under the settlement, to a purchaser, by the description of all his life and other estate and interest in all the monies, stocks, funds and securities, and messuages, lands, tenements and hereditaments into which the monies, stocks, funds and securities were, or, *at any time thereafter, might be converted and changed.*

Held that the tenant for life's power to consent to a resale of the lands, was not destroyed by the alienation of his interest under the settlement.

BY the settlement on the marriage of Sir *Howard* and Lady *Elphinstone*, dated the 28th of September 1829, after reciting that two bonds had been executed to *R. W. Rothman* and *Herbert Barrett Curteis*, the trustees of the settlement, one by Sir *Howard*, for 10,000*l.*, and the other by *Edward Jeremiah Curteis*, for 15,000*l.*; it was declared that the trustees should stand possessed of the 10,000*l.* and 15,000*l.*, and of the stocks, funds and securities in or upon which those sums should be, from time to time, invested under the provisions thereinafter contained, in trust for Sir *Howard* for life, remainder in trust for Lady *Elphinstone* for life, remainder upon the trusts thereinafter declared for the benefit of the children of their marriage: and *Edward Jeremiah Curteis* covenanted, with the trustees, that he, his heirs or devisees would, as soon as the 10,000*l.* should have been received by the trustees, further and collaterally secure the 15,000*l.*, by such a mortgage of his estates as, under the provisions contained in the settlement for the investment of the trust funds on real securities, the trustees would be at liberty to accept. The settlement further declared that the 10,000*l.* and 15,000*l.* should be invested, by the trustees, in their names, in or upon the public stocks or funds or on government or real securities, or the stocks or funds of the Bank of *England* or the

Holdsworth v Goose 29 Beav. 113.
Alexander - Mills 6 Ch. 134

1849.

WARBURTON v. FARN.

East India Company; and that it should be lawful for the trustees, from time to time, to vary and transpose all or any of the stocks, funds or securities which should, from time to time, be subject to the trusts aforesaid, for, into or upon any such stocks, funds or securities as aforesaid; but that every such investment, variation and transposition, if made during the lives of Sir *Howard* and Lady *Elphinstone* or the life of the survivor of them, should be made with their, his or her consent, to be signified in writing: And that it should be lawful for the trustees, at the request in writing of Sir *Howard* and Lady *Elphinstone* during their joint lives, and, after the decease of either of them, at the request in writing of the survivor of them, to call in and convert into money the trust-funds or any of them, and to invest the same in the purchase of any messuages, lands, tenements or hereditaments in *England* or *Wales*, of the tenure of freehold or copyhold of inheritance, or held for any term of years of which not fewer than sixty should be unexpired at the time of such purchase; and that the messuages, &c., so to be purchased, should be conveyed, surrendered or assigned to the trustees, their heirs, executors, &c., according to the tenure thereof; and that the trustees, their heirs, executors, &c., should, *with the consent of Sir* Howard *and Lady* Elphinstone *during their joint lives*, and, after the decease of either of them, with the consent in writing of the survivor of them, and, after the decease of the survivor of them, then at the discretion of the trustees, resell the messuages &c., and stand possessed of the proceeds upon the trusts which would be then subsisting and capable of taking effect in the trust funds if the same had not been called in and converted into money and invested in the purchases thereinbefore mentioned; and that the hereditaments so to be purchased should, in the mean time,

1849.

WARBURTON v. FARN.

be considered as personal estate, and the rents thereof be paid to the persons and applied in the manner to whom and in which the interest, dividends, &c., of the trust funds would have been payable and applicable if no conversion of the same into real estate had taken place: and the settlement empowered the trustees, at such request as aforesaid, to exchange any of the hereditaments which should have been so purchased, for any such estates as the trustees were thereby authorized to purchase; and to lease the hereditaments to be purchased and received in exchange, but, during the lives of Sir *Howard* and Lady *Elphinstone* or the life of the survivor of them, with their, his or her concurrence; and it also empowered Sir *Howard* and Lady *Elphinstone*, during their joint lives, and the survivor after the death of either of them, and the executors or administrators of the survivor after the death of both of them, to appoint new trustees.

In October 1833, the trustees, at the request of Sir *Howard* and Lady *Elphinstone*, agreed, in consideration of Sir *Howard's* bond for 10,000*l.* being delivered up and cancelled, to purchase of him two farms of which he was seised in fee, and one of which was called the *Ridge* farm, and also a house in *Eaton Place, Middlesex*, of which he was possessed for a term of eighty years from the 25th of March 1830: and, by indentures of the 7th and 8th of October 1833, Sir *Howard* conveyed the farms and house to the trustees, and they delivered up his bond to him.

By an indenture dated the 24th of June 1835, Sir *Howard* mortgaged his life and other estate and interest in the sums of 10,000*l.* and 15,000*l.* settled by his

1849.

WARBURTON v. FARN.

executors, administrators and assigns, absolutely, for and during the life of Sir *Howard*.*

By lease and release of the 29th and 30th of January 1836, the release being made between Sir *Howard* and Lady *Elphinstone* of the first part, *Rothman* and *Herbert Barrett Curteis* of the second part, the Plaintiff of the third part and *Cowburn* of the fourth part, Sir *Howard* and Lady *Elphinstone*, in exercise of the power for that purpose contained in the settlement, appointed the Plaintiff to be a trustee in *Rothman's* place; and the freehold hereditaments which were then subject to the trusts of the settlement, were conveyed† to *Cowburn*, his heirs and assigns, to the use of the Plaintiff and *Herbert Barrett Curteis*, their heirs and assigns, upon the trusts of the settlement.

In November 1847, the Plaintiff and *Herbert Barrett Curteis* agreed, with the consent in writing of Sir *Howard* and Lady *Elphinstone*, to sell the *Ridge* farm to the Defendants. In December following, *H. B. Curteis* died.

In January 1849, the bill was filed for a specific performance of the agreement. It alleged that *Edward Barrett Curteis* was willing and had offered, if necessary, to join in making a title, to the farm, to the Defendants.

* The above deed is set forth, correctly, from the statement of it in the bill. In the argument, it was said to have been made in exercise of the power of sale given to *Cowburn*; but *that* did not appear from the statement in the bill.

† The bill did not state by whom. *Cowburn* was Sir *Howard's* solicitor.

The Defendants by their answer said that they were advised that, under the circumstances stated in the bill, and by reason of the mortgage security executed by Sir *Howard* to *Cowburn*, and of the exercise of the power of sale therein contained and of the sale thereunder of Sir *Howard's* life-interest by *Cowburn* to *Edward Barrett Curteis*, *Sir* Howard *had parted with the whole of his life interest*, and the same was then vested in *E. B. Curteis*, and, *therefore*, *Sir* Howard *was unable, under the terms and provisions of the settlement, to give a valid consent to the sale of the farm*, without which, the Defendants were advised, the Plaintiff was not authorized to sell the farm, and was unable to make them a good title thereto: and that the only point at issue between them and the Plaintiff, was whether the power of consenting to the sale in question in this suit, as required by the settlement and thereby vested in Sir *Howard* and his wife, was not *a personal power and confidence vested in Sir* Howard, *appendant to his life-interest under the settlement, and, in law and equity, extinguished and destroyed and no longer validly exercisable by him by reason of the alienation of such his life-interest*, nor, by law, validly transferable to or validly exercisable by the alienee of such life-interest.

Mr. *Bethell* for the Plaintiff, said;

By the settlement on the marriage of Sir *Howard* and Lady *Elphinstone*, power was given to the trustees to invest the trust-funds in the purchase of lands; and, in pursuance of that power, they invested part of the funds in the purchase of a farm called the *Ridge* farm. The settlement also empowered the trustees, with the consent of Sir *Howard* and Lady *Elphinstone* during their joint lives, to resell the lands; and, in exercise of that power, the Plaintiff and his late co-trustee, have

1849.

WARBURTON v. FARN.

trustees should be deprived of their power of sale, however beneficial that power might be to Lady *Elphinstone* and the other parties interested under the settlement.

Mr. *James Parker* and Mr. *Rogers* for the Defendants:

The Plaintiff's Counsel have attempted to distinguish a power given to a tenant for life to do an act, from a power given to him to consent to the act being done by the trustees of the settlement: but there is no real distinction between the two powers: both of them are appendant to the life-estate, and, consequently, both are extinguished by an alienation of that estate (*k*): *Badham* v. *Mee*; *Hole* v. *Escott* (*l*). The latter case shows that there is nothing in the point that the power to consent in this case, was joint: for it was there held that a joint appointment made by the tenant for life and his wife after the bankruptcy of the former, was inoperative.

Besides, Sir *Howard* has sold the whole of his interest to *E. B. Curteis*; and, therefore, he cannot, without derogating from his own act, authorize anything to be done which will have the effect of changing the nature of the property which *Curteis* has purchased.

[The *Vice-Chancellor.*—*Curteis* appears, on the face of his conveyance, to have taken convertible property. It seems that he did not stipulate for a life interest *in land*; but that it was indifferent to him whether he took

(*k*) 1 Sugd. Pow. 63, 66, 71 and 73
(*l*) 4 Myl. & Cr. 187.

that interest in land or in money. The parcels of his conveyance are: "All the life and other estate and interest of the said Sir *Howard Elphinstone*, in the said sums of 10,000*l.* and 15,000*l.*, and in the freehold, copyhold and leasehold hereditaments and premises purchased with parts of such sums; and also all the part or share, and parts or shares, and the life and every other estate and interest, of the said Sir *Howard Elphinstone*, of and in all the monies, stocks, funds and securities, and messuages, lands, tenements and hereditaments, freehold, copyhold and leasehold into which the monies, stocks, funds and securities and other property hereinbefore mentioned, and the interest of the said Sir *Howard Elphinstone* wherein is hereby assigned, or any of them, are or is, or, *at any time hereafter may be converted and changed.*" Therefore, *Curteis* took a conveyance of Sir *Howard's* interest in the property as it then was or as it might thereafter be: and, that being the case, the question is whether he must not be taken to have agreed, in effect, that the power of consenting to a sale of the property by the trustees, should remain vested in Sir *Howard.*]

The Defendant's Counsel remarked that it was very important that they should know the precise words of that conveyance; and they then proceeded to observe upon the cases cited for the Plaintiff. They said: The decision in *Ren* v. *Bulkeley* was founded on the erroneous opinion entertained by Lord *Mansfield*, that a mortgage was, even at law, a mere security for money, and not an actual conveyance. It has been always considered as an unsound decision, and never has been followed. In *Tyrrell* v. *Marsh* the question was whether a power of sale was destroyed by a fine which had been levied for the purpose of securing an annuity; and

1849.

WARBURTON v. FARN.

the Court held that it was not; as the only object of the fine was to secure the annuity.—*Davies* v. *Rush* too, turned, entirely, on the operation of a fine. On those cases, it is impossible to come to the determination that the power in this case, has not been destroyed by the alienation of the life-estate.

There is another objection which we have not yet adverted to, namely, that the Plaintiff was not duly appointed a trustee of the settlement. For the deeds executed for that purpose, were not made until Sir *Howard* had assigned his life-interest to *Cowburn*, and thereby deprived himself of the power to appoint new trustees.

The VICE-CHANCELLOR:

I do not think that there is much difficulty in deciding this case.

With respect to the legal estate, there can be no doubt that it is now vested in the Plaintiff: and, with respect to that species of power which Sir *Howard Elphinstone* had to consent to an exercise of the trust for sale, it seems to me that it is not destroyed by the alienation of his life-interest. For the conveyance of that interest to the purchaser, shows that the contract between him and the purchaser, was that the property which was the subject of the contract, should retain its convertible quality; which it could not do unless Sir *Howard* retained his power of consenting to an exercise of the power of sale by the trustees.

Declare that, having regard to the language of the deeds by which Sir *Howard Elphinstone's* life-interest under the settlement was dealt with, Sir *Howard* is still

capable of giving a valid consent to the alienation, by the Plaintiff, of the legal estate in the farm agreed to be sold to the Defendants; and decree a specific performance of the agreement.

1849.
WARBURTON
v.
FARN.

FOSTER *v.* FOSTER.

1849:
2nd May.

Pleading.
Parties.

A bill was filed against *A. B.* and *C. C.* was served with a copy of the bill, but died before appearance.

Held that an original bill must be filed for the purpose of bringing his personal representative before the Court, and that *A.* and *B.* must be made parties to it.

THOMAS FOSTER having, by his will, directed his real estates to be sold and the proceeds of the sale and his personal estate, after payment of his debts, &c., to be divided amongst his children, a bill was filed, in June 1847, by *John Foster*, one of the children, against his brothers and sisters and the executors and trustees of the will, for the administration of *Thomas Foster's* estate and to have the trusts of his will carried into execution. All the testator's children who were Defendants to that bill, were served with office copies of it, under the 23rd Order of August 1841. One of them, *William Penn Foster*, died before he had appeared to the bill.

The Cause came on to be heard in November 1848; but, as no step had been taken for the purpose of bringing *William Penn Foster's* personal representative before the Court, the Cause was ordered to stand over in order that a bill might be filed for that purpose. Accordingly, *John Foster* filed a bill in January 1849, which, after setting forth the statements in the original bill, as *substantive statements*, proceeded thus: "That, on or about the 2nd day of June 1847, your orator filed his original bill of complaint, in this Honourable Court, against (naming the Defendants to it) and such

1849.

FOSTER v. FOSTER.

bill stated as or to the effect hereinbefore stated; and charged, &c. &c. The bill of 1849 then set forth the charges and prayer of the original bill, *as such*; after which it stated that the executors and trustees of *Thomas Foster's* will, were duly served with process, and appeared and put in their answers to the original bill, and that *William Penn Foster* and the other Defendants, were duly served with a copy of the same bill, and that a memorandum of such service was duly entered in accordance with the rules of the Court; and that the Cause came on to be heard in November 1848, when it was ordered to stand over, as before mentioned: it then stated that *William Penn Foster* made his will dated the 25th of July 1843, and thereby constituted his wife, *Ann Foster*, universal legatee, but did not appoint any executor thereof. It then alleged, *by way of supplement*, that *Ann Foster* had renounced administration of *William Penn Foster's* effects with his will annexed, and that letters of administration of his effects, limited to the purposes of the *said* suit, had been granted to *F. Papps*, a Defendant thereto: that the legal estate in all such parts of *Thomas Foster's* freehold and leasehold estates as remained unsold, was vested in *T. N. Foster*, *H. Compton* and *J. A. Stokes*, (who were three of the Defendants to the original bill,) jointly with one *John Greaves*, under a settlement made, in January 1830, by *Thomas Foster* of the one part and *T. N. Foster*, *H. Compton*, *J. A. Stokes*, and *Greaves*, of the other part; and that it was alleged that *Greaves* was a necessary party to *this* suit.

The bill of 1849 prayed (pursuant to the 23rd Order of August 1841) that *Papps*, on being served with a copy of the bill, might be bound by all the proceedings in the Cause, and that *Greaves*, who was the only other

Defendant, might answer the *premises*; and it then repeated the prayer of the original bill, *verbatim*.

On the Causes coming on to be heard,

Mr. *Stuart*, Mr. *James Parker*, Mr. *Lloyd* and Mr. *Nichols*, for the Defendants to the original suit, objected that, as *William Penn Foster* had not appeared in the original suit, the bill which had been filed to bring his personal representative before the Court, was, in fact, an original bill, though it purported to be a supplemental one; and, therefore, all the persons who were Defendants to the original suit, ought to have been made parties to it; especially, as it prayed that the personal representative might be bound by the proceedings in that suit. They relied on *Hardy* v. *Hull* (*a*).

Mr. *Hardy*, for the Plaintiff, said that the bill in question, was an original bill in the nature of a supplemental bill; that it placed *William Penn Foster's* personal representative in precisely the same position as *William Penn Foster*, himself, would have been in if he had lived, and, therefore, it effected all that was necessary.

Mr. *Prior* appeared for *Greaves*.

The *Vice-Chancellor* said that *Greaves* ought to have been made a party to the original bill, by amendment: and that he thought that, in point of form, the Defendants to the original bill ought to have been made parties to the bill against the personal representative of *William Penn Foster*; for, in fact, it was an original bill: and, therefore, the Causes must stand over, with liberty to

(*a*) *Ante*, Vol. XIV. page 21.

1849.

FOSTER v. FOSTER.

the Plaintiff to amend that bill by adding parties or otherwise as he might be advised; and he must pay the costs of the day.

WATTS v. SYMES.

1849: 24th February and 2nd May.

Mortgagor and mortgagee. Debt. Extinguishment. Priority.

A. having a reversionary interest in personalty which he had mortgaged first to *B.* and next to *C.*, agreed to sell it to *D.*, for 1500*l.*; and *D.* having, at his request, paid off *B.* out of the 1500*l.*, he agreed that, until the sale should be completed, *D. should stand in the place of* B. *and have the full benefit of her security.* Held that *B.'s* debt was extinguished by the payment made to her by *D.*; and, consequently, that *D.* was not entitled to priority over *C.*

BY an indenture dated the 28th of September 1843, *John David Symes* mortgaged certain freehold and leasehold tenements to the Plaintiffs, to secure 200*l.* By an indenture dated the 27th of May 1845, after reciting the indenture of September 1843 and that the 200*l.* was still due to the Plaintiffs on the security thereof, *Symes* covenanted with the Plaintiffs that the tenements should, thenceforth, stand charged with and be a security for the further sum of 400*l.*, which he then owed them: and, being entitled, in reversion expectant on the decease of his mother, to a share of the residuary estate of *Mary Pidsley* (which was then invested, on different securities, in the names of the trustees of that lady's will) he assigned the same to the Plaintiffs, subject to his mother's life-interest and to an indenture of the 27th of November 1844, whereby the same premises were assigned to the Plaintiff, *Watts*, upon trusts for securing 1200*l.* to *Mary Severne*: and the now stating indenture contained a proviso making it void on payment of the 400*l.*

The bill was filed against *J. D. Symes* and one *Tanner*; and, after stating as above, it alleged that *Symes* had sold all his right and interest in Mrs. *Pidsley's* residuary estate, to *Tanner*, and that *Tanner*, either as the agent or on the behalf of *Symes* and before the sale, or on

1 De G. & S. 240

Garrard v Frankel 30 Beav. 449.

his own behalf and after the sale, had paid the 1200*l.* to *Mary Severne*; and that he sometimes claimed to be the owner of and sometimes to be an incumbrancer upon, and, sometimes, *to be both the owner of and an incumbrancer upon* the equity of redemption of the share of Mrs. *Pidsley's* residuary estate which he had purchased: that, when he paid Mrs. *Severne* the 1200*l.*, she did not make any transfer of her incumbrance or security, but, on the contrary, expressly refused so to do; and that the Plaintiffs were the only incumbrancers on the premises comprised in the indentures of 1843 and 1845. The bill prayed that *Symes* and *Tanner* might pay, to the Plaintiffs, what was due to them on the security of those indentures, or be foreclosed.

Tanner stated, in his answer, that *Symes*, being much pressed, by his creditors, for the payment of their demands upon him, and being unable to satisfy the same, applied to *Tanner*, who was a friend and connexion of *Symes*, to purchase his reversionary interest in Mrs. *Pidsley's* residuary estate, and that *Tanner* consented so to do; and thereupon *Symes*, at his request, procured his interest to be valued by the actuary of the *West of England* Insurance Company, who valued it at 1474*l.*; and *Tanner*, after he was informed of the valuation, offered to give *Symes*, 1500*l.* for his interest: that such interest was subject to a mortgage to Mrs. *Severne*, and that *Symes*, having been served with notice to pay it off and being unable so to do, *Tanner*, at his request, consented to pay it off, upon an agreement that he should take a transfer, from Mrs. *Severne*, of her mortgage and stand in her place as mortgagee, until the sale to him should be completed or in case it should not be carried into effect; and that, accordingly, he paid Mrs. *Severne* her 1200*l.* *out of his own monies*, and

1849.

WATTS v. SYMES.

she handed over to him the mortgage and other deeds in her possession relating to Mrs. *Pidsley's* estate; and that she verbally agreed to execute a transfer of the mortgage to him, when requested; but that he did not then require her to execute such transfer, because no solicitor or other male friend of hers was present; and that, on the morning of the day on which he paid the 1200*l.*, *Symes* signed a memorandum, dated the 30th of July 1846, and in the following words: "I the undersigned *J. D. Symes*, hereby acknowledge and declare that *George Tanner* has agreed to purchase of me and I have agreed to sell to him all my reversionary estate, right and interest in all the real and personal estate and effects of *Mary Pidsley* deceased, at or for the price or sum of 1500*l.*, subject to my mother's life-interest therein: and I further acknowledge and declare that the said *George Tanner* has, at my request, paid to Mrs. *Mary Severne*, the mortgagee of my said reversionary estate and interest, the sum of 1200*l. in discharge of her said mortgage, out of the said purchase-money of* 1500*l.*, and I agree to execute, and that all parties interested in my said reversionary property shall join in executing, on request, a proper conveyance or assignment of the said reversionary estate and interest unto the said *George Tanner*, his executors, administrators, and assigns, and, until such conveyance or assignment can be duly executed, the said *George Tanner*, his executors, administrators and assigns, *shall stand in the said* Mary Severne's *place and stead as mortgagee thereof* and have the full benefit of her mortgage security." *Tanner* further stated that the agreement between him and *Symes*, still remained unperformed; and that since the signing of the memorandum, he had applied to Mrs. *Severne*, to execute to him a transfer of her mortgage; but that, notwithstanding her aforesaid agreement to execute such transfer, and

although, at the time when he paid her the 1200*l.*, she was informed that such payment was made *out of his own proper monies*, she, acting, as he believed, under the advice and influence of the Plaintiffs, refused to execute such transfer: but he submitted that, under the circumstances aforesaid, he was entitled to stand in her place in respect of the payment so made to her by him as aforesaid, and to have the benefit of her security until the sale to him should be completed or in case the same should not be carried into effect.

Mrs. *Severne* and one of her daughters who was present when *Tanner* paid her the 1200*l.*, deposed that nothing was said about a transfer of the mortgage. *Symes* (who became bankrupt after putting in his answer) deposed that he and a gentleman named *Holman*, were present when *Tanner* paid the 1200*l.*; and that *Tanner* paid it, not as *Symes's* agent, but out of his own money: and that Mrs. *Severne* agreed to execute any transfer or other document which was right and proper, when called upon by *Tanner*. * *Holman* deposed to the same effect.

With this contradictory evidence, the Cause came on to be heard.

Mr. *Rolt* and Mr. *Shapter*, for the Plaintiffs, contended that Mrs. *Severne's* debt was extinguished by the payment made to her by *Tanner*, and that, thereupon, her

* *Symes's* evidence was objected to on the ground that, though he was a bankrupt, the decree would give him a right to redeem; see *Garth* v. *Thomas*, 2 Sim. & Stu. 188. But the objection was overruled.

1849.

WATTS v. SYMES.

security became incapable of being transferred. They cited *Peacock* v. *Burt* (*a*), *Dunstan* v. *Patterson* (*b*), *Toulmin* v. *Steere* (*c*), *Greswold* v. *Marsham* (*d*), *Brown* v. *Stead* (*e*), *Medley* v. *Horton* (*f*), *Farrow* v. *Rees* (*g*), *Jones* v. *Davids* (*h*), and *Smith* v. *Phillips* (*i*).

Mr. *Stuart*, for *Tanner*, said that, as Mrs. *Severne's* interest was merely equitable, it was not necessary for her to execute any transfer or assignment of it; because, as *Symes* had agreed that *Tanner*, on his paying off the debt due to her, should stand in her place and have the benefit of her security, *Watts* became a trustee for *Tanner* as soon as the debt was paid.

Mr. *Dickinson*, who was with Mr. *Stuart*, cited *Moçatta* v. *Murgatroyd* (*k*), and said that *Tanner* paid the debt not as agent for *Symes*, but out of his own money, and consequently the debt was not extinguished, but *Watts* was a trustee of the security, for him: that the agreement between *Symes* and *Tanner*, had not been completed; and, therefore, this case was plainly distinguishable from *Brown* v. *Stead*; for there the equity of redemption had been actually conveyed to the second mortgagee.

Mr. *Teed* appeared for *Symes*, and Mr. *Willis* for his assignee.

(*a*) Coote on Mortg. 693. 222.
(*b*) 2 Phill. 341, see 345.
(*c*) 3 Mer. 210.
(*d*) 2 Ca. in Ch. 170.
(*e*) *Ante*, Vol. V., page 535.
(*f*) *Ante*, Vol. XIV., page
(*g*) 4 Beav. 18.
(*h*) 4 Russ. 277.
(*i*) 1 Keen, 694.
(*k*) 1 P. Wms. 393.

1849.

WATTS v. SYMES.

The VICE-CHANCELLOR:

The question in this case must be determined by considering with whose money Mrs. *Severne's* debt was paid.

By the deed of November 1844,* she did not become a mortgagee of *Symes's* interest in Mrs. *Pidsley's* residuary estate: but it appears that, prior to the date of that deed, *Symes* had mortgaged his interest to the Plaintiffs for 1200*l.*; and that, on Mrs. *Severne* paying them that sum, they assigned the property to the Plaintiff, *Watts*, as a trustee for her. Then, in 1845, the Plaintiffs became second mortgagees of that property. In July 1846, *Tanner*, in pursuance of an arrangement between him and *Symes*, paid Mrs. *Severne* her 1200*l.* Whether that payment was made on the 29th or the 30th of July, is not distinctly made out, nor is it material; for the true view of the case is that that payment and the agreement of the 30th of July, were one transaction. *Tanner* certainly might have persuaded Mrs. *Severne* to make an assignment or a declaration of trust, which would have enabled him to stand in her situation: but the agreement of July 1846, which creates *Tanner's* right and which is signed by *Symes* under whom he claims, affords most conclusive evidence that, if he did make any proposal on that subject, to Mrs. *Severne*, she declined to accede to it; for that agreement contains these words: "And I further acknowledge and declare that the said *George Tanner* has, at my request, paid to Mrs. *Mary Severne*, the mortgagee of my said reversionary estate and interest, the sum of 1200*l.*, *in discharge* of her said mortgage, *out*

* This deed was not fully set forth in the pleadings, with which alone the Reporter was furnished.

1849.

WATTS v. SYMES.

of the said purchase-money of 1500*l.*" I take that to be an acknowledgment, by which *Tanner* is bound, that the payment to Mrs. *Severne* was not a payment by *Tanner* out of his own money, but that it was a payment by him, at *Symes's* request, of part of *Symes's* purchase-money. *Tanner* might have managed the matter in a different manner; but, managing it as he did, the debt was extinguished.

The minutes of the decree declared that the trusts for securing, raising and paying the 1200*l.* to Mrs. *Severne*, declared by the indenture of 1844, had been fully satisfied, and that the charge for the 1200*l.* created by that indenture in favour of Mrs. *Severne*, was extinguished; and that the Plaintiffs were the first incumbrancers as well on *Symes's* share of Mrs. *Pidsley's* residuary estate, as on the hereditaments comprised in the deed of 1843; and that, upon *Tanner* paying them what should be found on their securities of 1843 and 1845, he should be at liberty to redeem the premises comprised in those securities.

1849.
2nd May.

WATTS
v.
SYMES.

Mortgagor and mortgagee. Tacking.

In 1843, *A.* mortgaged freeholds and leaseholds to *B.*, for 200*l.* In 1845, after reciting that mortgage, he charged the freeholds and leaseholds with the further sum of 400*l.* which he then owed *B.* and assigned other property, to *B.*, as a further security for that sum, and empowered *B.* to sell the property and to retain the 400*l.* out of the proceeds.

Held that the property assigned in 1845, was redeemable on payment of the 400*l.* only.

On this day the Cause was placed in the paper, at the request of *Tanner's* Counsel, in order that the minutes might be spoken to.

Mr. *Stuart* and Mr. *Dickinson*, for *Tanner*, said that there could be no tacking in this case; for, first, the property comprised in the deed of 1845, was not vested in the Plaintiffs: and, secondly, that it was clearly the intention of the parties to that deed, that the property comprised in it should be charged *with the* 400*l. only*; and, therefore, that *Tanner* ought to be allowed to redeem the property comprised in the deed of 1845, on payment of the 400*l.* only. They cited *Jones* v. *Smith* (*a*), and added that though that case was reversed by the House of Lords, it was reversed on grounds different from those on which the *Master of the Rolls* had decided it; and that the reasoning of the *Master of the Rolls* applied to the present case.

Mr. *Rolt* and Mr. *Shapter*, for the Plaintiffs, referred to *Ex parte Carter* (*b*), *Coote* on Mortg. 485, and *Ex parte Berridge* (*c*).

Mr. *Teed* appeared for *Symes*, and Mr. *Martindale*, for his assignee.

The VICE-CHANCELLOR:

I must say that, on looking at the securities, it appears to me that the parties intended to make the security for the payment of the 400*l.* out of the share of Mrs. *Pidsley's* residuary estate, a separate thing from the security

(*a*) 2 Ves. Jun. 372; see 6 Ves. 229, note (10).
(*b*) Amb. 733.
(*c*) 3 Mont. Deac. & De Gex. 464.

1849.

WATTS v. SYMES.

on the freehold and leasehold tenements. There is a trust for sale of the share; and the deed provides that the 400*l.* shall be paid out of the proceeds of the sale; but it does not make the 200*l.* payable out of those proceeds.

Therefore the minutes must be altered by making the share of Mrs. *Pidsley's* estate redeemable by the Defendant, on his paying the Plaintiffs what shall be found due in respect of the 400*l.*

MEMORANDUM.

Cole v. *Scott*, reported *ante*, p. 259, has been affirmed by the *Lord Chancellor*; see 1 *Hall* & *Twells*, 477, and 1 *Macnaghten* & *Gord.* 518.

AN

INDEX

TO THE

PRINCIPAL MATTERS.

ABATEMENT OF LEGACY.

See LEGACY, 3.

ACCUMULATION.

1. The Thellusson Act must receive the same construction in the case of a trust for accumulation created by deed, as it has received in the case of a similar trust created by will, and, therefore, where A. transferred a sum of stock to trustees, and, by a deed, directed them to accumulate the dividends during the joint lives of M. and N., that direction was held to be good for so much only of the joint lives as expired between the date of the deed and A.'s death. [*Rosslyn's trust, In re.*] 391
2. Testator devised his freehold estates to trustees in trust to accumulate the rents during the life of his niece, and, on her decease, to stand seised of the estates, to the use of her first and other sons in tail. The testator died in 1827, leaving his niece surviving. Held that the trust for accumulation became void at the end of twenty-one years after the testator's death, and that the testator's heir was entitled to the rents during the remainder of the niece's life. Testator directed the rents of his freehold estates, and the income of his residuary real personal estate, to be accumulated, in order to provide for the younger children of his niece, and of E. S., each of whom took an interest under his will; and, in the clauses for the maintenance and advancement of the children, he termed the provision which he had so made for them, sometimes *their portions*, and, sometimes, their *portions or shares*. Held that the provision was not a provision for raising portions within the meaning of the proviso in the second sect. of the Thellusson Act, and, therefore, was not exempted from the operation of the first section. [*Halford* v. *Stains.*] . 488

ADEMPTION.

See CONSTRUCTION, 7.

ADMINISTRATION.

See ASSETS—COLONIAL REPRESENTATION—HEIR.

ADMINISTRATORS.

See EXECUTORS AND ADMINISTRATORS.

AFFIDAVITS.

A party who moves the Court to enlarge publication, after having made an unsuccessful application to the Master, may read affidavits filed subsequently to the proceeding before the Master. [*Peel* v. *Hague*] 315

See CONTEMPT.

AMENDMENT.

A. obtained a special injunction, until answer or further order, in a suit in which he was sole plaintiff; and then amended the bill by making B. a co-plaintiff. Held that the injunction was gone, by the amendment. [*The Attorney-General* v. *Marsh*] 572

ANNUITY.

1. After the death of a person who had covenanted to pay an annuity, a suit was instituted for the administration of his assets, pending which, the annuity became in arrear. The Court refused to allow interest on the arrears. [*Jenkins* v. *Briant*] 272

2. Testator, after directing a fund to be formed by investing the rents of his estates in the purchase of Bank Annuities, charged it with the payment of 150*l.* a year, to his wife during her life. Held that, though the 150*l.* was not a continuing payment, the executors of the wife, who outlived the testator between seven and eight years, were entitled to a proportionate part of the 150*l.* a year, for the interval between the death of the wife, and the last preceding yearly day of payment. [*Carter* v. *Taggart*] . . . 447

3. A testator domiciled in Jamaica, gave to his son, "one clear annuity of 100*l. per annum*, for and during his natural life, and, should he die, a child him surviving, I continue the same annuity for such child's use and benefit, to be paid to his or her mother:" the testator then gave two annuities of 100*l. sterling*, to two other persons; and bequeathed his residuary estate to his executors, in trust, amongst other things, to pay the several legacies and annuities before given by him. Held that the annuities given to the son and his child were to be paid in Jamaica currency and not in sterling; and that the child's annuity was a perpetual one. [*Yates* v. *Maddan*] 613

APPOINTMENT.

1. Testator empowered his executors for the time being, to advance to his nephew any sum or sums of money not exceeding 30,000*l.* The executors exercised the power to the extent of 20,000*l.* Held that they were not precluded, thereby, from making a further advance to the nephew. The case of *Brown* v. *Nisbett*, 1 Cox, 13, observed upon. [*Webster* v. *Boddington*] . 177

2. Stock was transferred to trustees in trust for such persons as A. and his wife should jointly appoint; and, in default of appointment, in trust, during their joint lives for the separate use of the wife; and in case A. should die first, in trust for his wife absolutely; but if she should die first, in trust for him for life, and, subject thereto, in trust for such persons as his wife, notwithstanding her coverture, should, by will, appoint, and, in default of such appointment, in

trust for her next of kin. The wife, *in A.*'s *lifetime*, made a will in exercise of the last-mentioned power. A. died before her. On her death, her will was admitted to probate, but the probate was limited to the property which she *had power* to dispose of. Held that the will was inoperative. [*Price* v. *Parker*] 198

3. Testatrix having power under her late husband's will, to dispose of 10,000*l.* Consols, recited the power, and then proceeded thus: "Now I do give and bequeath the said 10,000*l.* Consols in manner following; that is to say I give, to G. A. the sum of 500*l.* sterling: I give, to my executors, the sum of 600*l.* Consols in trust to pay the dividends to S. T. during her life, and after her decease, the said 600*l.* to sink into the residue of my estate: I give and bequeath, to H. B., his executors, &c., all *the rest and residue of the said* 10,000*l. Consols, after deducting therefrom the legacies above mentioned.* G. A. died in the testatrix's lifetime. Held that the 500*l.* given to him was not to be deducted from the 10,000*l.* Consols. [*Carter* v. *Taggart*] 423

4. Testator, after directing a fund to be formed by investing the rents of his estates in the purchase of Bank Annuities, charged it with the payment of 150*l.* a year, to his wife during her life. Held that, though the 150*l.* was not a continuing payment, the executors of the wife, who outlived the testator between seven and eight years, were entitled to a proportionate part of the 150*l.* a year, for the interval between the death of the wife, and the last preceding yearly day of payment. [*Carter* v. *Taggart*] 447

See STAT. 7 Will. 4 & 1 Vict. c. 26.

APPOINTMENT OF NEW TRUSTEES.

The Master directed to *appoint* a new trustee, although some of the *cestuis que trust* were infants, and another was out of the jurisdiction. [*Hunter* v. *Gibson*] . . . 158

APPORTIONMENT.

See ANNUITY, 2.

APPRENTICE FEE.

See ARTICLED CLERK.

ARTICLED CLERK.

An attorney, to whom a clerk was articled, died before the Articles expired. Held that the Court had jurisdiction to order part of the premium paid to the attorney, to be repaid out of his assets. [*Hirst* v. *Tolson*] 620

ASSETS.

The Court has jurisdiction to order the real estates of a deceased debtor to be sold for payment of his debts, in a suit instituted, not by a creditor of the deceased, but by a person interested in his estates under his will. [*Rodney* v. *Rodney*] 307

ATTACHMENT.

See PRACTICE, 4.

BANK SHARES.

See MORTMAIN.

BANK STOCK.

See BONUS—ENJOYMENT IN SPECIE.

BANKRUPT.

The interest of a bankrupt in leaseholds, is not finally divested until

the creditors' assignees are chosen; and, therefore, if only *the official* assignee has been appointed, the bankrupt cannot plead his bankruptcy to a bill filed, against him, to have the trusts of the will under which he took the leaseholds, carried into execution. [*Turner* v. *Nicholls*] 565

BENEFIT BUILDING SOCIETY.

A joint-stock company cannot hold shares in a benefit building society established under 6th & 7th Will. IV. c. 32, for regulating benefit societies. [*Dobinson* v. *Hawks*] 407

BILL OF SALE.

In January 1848, A. gave B. a bill of sale of his household furniture, to secure a debt due from him to B. On the 21st of February 1849, B. took possession of the furniture, and advertised it for sale. On the 8th of March following, a petition presented by A. under the Insolvent Debtors' Act, for protection from process, was filed. The Vice-Chancellor held that, though the bill of sale was unaffected, yet B.'s right to retain possession of the furniture was defeated. The Lord Chancellor, on appeal, directed B. to bring an action to try his right to the furniture. [*Parrott* v. *Congreve*] 579

BOARDERS.

See CHARITY, 3.

BOND.

In contemplation of a marriage between a lady, who was an orphan and a Protestant, and a gentleman, who was a Roman Catholic, a settlement was executed, to which the lady's uncle was a party, and the subjects of which were stock belonging to the lady, and two sums of money, one secured by the uncle's, and the other, by the gentleman's bond, and both of them payable to the trustees of the settlement twelve months after the date of the bonds. The settlement, after declaring trusts in favour of the lady and gentleman and their children, provided that, until the marriage should be duly had and solemnized according to the forms of the Church of England, or in case it should not be so solemnized within twelve months next after the date of the settlement, the trustees should stand possessed of *all the trust monies, securities and premises and the securities for the same, in trust for the lady*, her executors, &c., and should pay, assign and transfer the same accordingly. The marriage never took place. After the uncle's death, his bond was found amongst his papers, with the words: "Cancelled, the marriage never having taken place," written by him across the face of it. The Court, though it did not consider the bond to be invalidated, held that, according to the true construction of the proviso, the lady was not entitled as the *cestui que trust* of the bond. [*Mitford* v. *Reynolds*] 130

BONUS.

Tenant for life of bank-stock, held entitled to a bonus of one *per cent.* directed to be made out of the interest and profits on the capital stock of the bank. [*Preston* v. *Melville*] 163

BOROUGH-FUND.

The Corporation of Norwich restrain-

ed from soliciting, at the expense of the borough-fund, a bill in Parliament, to enable them to improve the navigation of the river which flows, through that city, to Yarmouth. [*The Attorney-General* v. *The Corporation of Norwich*] 225

CANCELLATION.

In contemplation of a marriage between a lady, who was an orphan and a Protestant, and a gentleman, who was a Roman Catholic, a settlement was executed, to which the lady's uncle was a party, and the subjects of which were stock belonging to the lady, and two sums of money, one secured by the uncle's, and the other, by the gentleman's bond, and both of them payable to the trustees of the settlement twelve months after the date of the bonds. The settlement, after declaring trusts in favour of the lady and gentleman and their children, provided that, until the marriage should be duly had and solemnized according to the forms of the Church of England, or in case it should not be so solemnized within twelve months next after the date of the settlement, the trustees should stand possessed of *all the trust monies, securities and premises, and the securities for the same, in trust for the lady*, her executors, &c., and should pay, assign and transfer the same accordingly. The marriage never took place. After the uncle's death, his bond was found amongst his papers, with the words: "Cancelled, the marriage never having taken place," written by him across the face of it. The Court, though it did not consider the bond to be invalidated, held that, according to the true construction of the proviso, the lady was not entitled as the *cestui que trust* of the bond. [*Mitford* v. *Reynolds*] . . 130

CHARITY.

1. Under a will dated in 1624, real and personal property was vested in the corporation of Reading, upon certain trusts for the poor of that town; and, if the corporation neglected to perform those trusts, or misemployed the property for one year, the will gave it over to the corporation of London, in trust for Christ's Hospital. In 1639 a decree was made on an information, in the Exchequer, against both corporations, which directed the corporation of Reading to apply the income of the property for the benefit of the poor of that town, but in a manner different from that prescribed by the will, and that, if the corporation of Reading should neglect to perform the premises or should misemploy the property for one year, they should convey it to the corporation of London in trust for Christ's Hospital. The corporation of Reading neglected to perform the directions of the decree, for several years. In 1837, certain individuals were appointed trustees of the property in their place, under the Municipal Corporation Act. The Court held the decree of 1639 to be binding, and the legal estate in the property, to be still vested in the corporation of Reading; and ordered them to convey the property to the corporation of London, in trust for the Hospital. [*Christ's Hospital* v. *Grainger*] 83
2. In 1704, Lady Hewley, an English Protestant Nonconformist, convey-

ed estates in England, to trustees (all of whom appeared to be resident in England, and some of whom at least were Protestant Nonconformists,) in trust, for such poor and godly preachers for the time being of Christ's Holy Gospel, and of such poor and godly widows for the time being of such preachers, as the trustees for the time being should think fit; for promoting the preaching of Christ's Holy Gospel in such manner and in such poor places as the trustees for the time being should think fit; for educating such young men designed for the ministry of Christ's Holy Gospel as the trustees for the time being should think fit; and for relieving such godly persons in distress, being fit objects of her own and the trustees' charity, as the trustees for the time being should think fit: and she directed that the trustees for the time being, should, in their dispositions and distributions of the aforesaid charities, have a primary respect to such objects thereof as aforesaid as were then or should afterwards be in York, Yorkshire or other northern counties in England, not excluding those in other places and counties, as the trustees for the time being, from time to time, should think fit. Held, by the Vice-Chancellor, that orthodox, English dissenting ministers and members of congregations, essentially and substantially, in doctrine and discipline, of the same sort as the orthodox dissenting congregations which existed in England, in 1704, and, therefore, that orthodox, English dissenting ministers and members of Baptist, Independent or Congregational, and Presbyterian congregations in England, *which were not in connexion with or under the jurisdiction of either the Kirk or of the Secession-church of Scotland*, were alone entitled to participate in the benefits of the charity; and that such of the trustees as were members of Presbyterian congregations in England which were in connexion with the Kirk, or with the Secession-church, ought to be removed. The last-mentioned trustees appealed from his Honour's decree; and, after the appeal had been opened, but before the argument was concluded, a decree was drawn up, at the request of the Defendants and with the approbation of the Attorney-General and the sanction of the Lord Chancellor in terms which admitted the ministers and members of Presbyterian congregations in England in connexion with the Kirk and the Secession-church of Scotland, to participate in the administration and benefits of the charity. [*The Attorney-General* v. *Wilson*] . 210

3. The Statutes of Manchester Free Grammar School declared that the master and usher (for whom stipends were provided by the foundation-deeds) should teach, freely and indifferently, every scholar coming to the school, without any money or other rewards taken therefore; that no scholar, of what county or shire soever, should be refused; that no scholar should bring meat or drink into the school; that vacancies in the trusteeship should be supplied by honest gentlemen and honest persons within the parish of Manchester; and that the trustees should have full power to augment, increase, expound and reform the provisions of the Statutes only concerning the schoolmaster, usher and scholars. The

master and usher had, for several years, taken boarders, and the boarders had participated in all the benefits of the charity; and the trustees of the school had been, generally, noblemen and gentlemen residing, not in the parish of Manchester, but in Lancashire and the adjoining counties. Held that the master and usher ought not to be allowed to take any more boarders; and that the trustees thereafter to be appointed ought to be honest gentlemen and honest persons residing within the parish of Manchester, and that persons who occupied and carried on business in manufactories, &c., in the town or parish, and had dwelling-houses within six miles of the school-house, were to be considered as being within the parish, for the purpose of their being eligible to be trustees. [*The Attorney-General* v. *The Earl of Stamford*] 453

See MORTMAIN—RAILWAY DEBENTURE.

CHOSE IN ACTION.

1. A female infant being entitled, under a will, to 1000*l.* and to the reversion of 2000*l.* expectant on her father's death, covenanted with the trustees of her marriage articles, to do all necessary acts, when she should attain twenty-one, for vesting those sums in the trustees, upon the trusts of the articles. Shortly before the infant attained twenty-one, the executors of the will, without any direction from her or her husband, transferred a sum of stock in which the 1000*l.* had been invested, to the trustees of the articles. Afterwards the husband died leaving his wife and her father surviving. Held that the transfer to the trustees, was a reduction into possession, and, therefore, that the 1000*l.* was bound by the articles; but that the wife was entitled, by survivorship, to the 2000*l.*, subject to her father's life-interest. [*Cunningham* v. *Antrobus*] 436
2. A lady married before she attained twenty-one, and, by her marriage articles, she and her husband covenanted to assign a trust-fund, in which she had a reversionary interest, to trustees in trust for her and her husband and the children of their marriage. A bill, for a specific performance of the articles, filed, by the children, against their father and mother, after the mother's interest had become an interest in possession, but whilst the fund remained outstanding, was dismissed. [*Borton* v. *Borton*] 552

See HUSBAND AND WIFE.

CODICIL.

See WILL, 17.

COLONIAL REPRESENTATION.

Colonial letters of administration will entitle the administrator to sue in this country, in respect of a sum of stock standing in the names of trustees, to a share of which the intestate was entitled. [*M'Mahon* v. *Rawlings*] 429

CONSTRUCTION.

The instrument by which a surveyor is appointed under the 85th sect. of the Lands Clauses Consolidation Act need not specify either the lands which the surveyor is to value, or the course of the railway. The sureties in a bond to be given to the land-owner, under that sec-

tion, may be appointed without notice to the land-owner; but the money secured by it ought not to be made payable on demand. The condition of the bond ought to adopt the words of the section, and make the money payable either to the obligee or into the Bank of England, "as the case may require." Money paid into the Bank under the 86th section, to the credit of *Ex parte* the promoters of the undertaking, the account of the land-owner, held to be rightly paid in. [*Poynder* v. *The Great Northern Railway Company*] . 3

2. A notice given by a railway company, under the 32nd sect. of the Railways Clauses Consolidation Act, of their intention to take temporary possession of land, ought to state for which of the purposes mentioned in that section the land is meant to be used. A notice that the company intend to enter upon the land for those purposes, *or some or one of them*, is not sufficient. [*Poynder* v. *The Great Northern Railway Company*] . 3

3. Testator gave all his real and personal property to his wife for life, and at her death, if he left issue, to the child or children he might have at his decease; but, if he died without leaving issue, then he gave all his property, in equal proportions, to his brothers and sister, Thomas, Anthony, John, and Jane; and, if any of them should die without leaving issue, he gave such share or shares to the survivors or survivor of them; but if leaving issue, he gave such share to their children. The testator died without issue. John died a bachelor in his lifetime. Jane died in the lifetime of his widow, leaving one child and several grand-children the issue of a deceased child. Thomas survived the widow and died leaving children. Then Anthony died a bachelor. Held that the share intended for John, belonged, absolutely, to Thomas, Anthony, and Jane: that Jane's share belonged to her child; Thomas's to his children; and Anthony's to his real and personal representatives. [*Benn* v. *Dixon*] 21

4. A power, to appoint a new trustee, on an existing one *becoming incapable* to act, does not apply to the case of a trustee going to reside abroad. [*Withington* v. *Withington*] 104

5. Testator, in the eighth clause of his will, directed his executors to purchase a piece of ground, which he described, and to erect a monument upon it for the interment of his own body and the bodies of his parents and sister, and to pay the expense out of the surplus of his property, after discharging his debts and legacies. By the ninth clause, he gave *the remainder* of his property to a charity. The owner of the piece of land refused to sell it. Held that the subject-matter of the ninth clause, was not so implicated with the subject-matter of the eighth, as that, the eighth having failed, the ninth must fail also; but that, the eighth having failed, the whole surplus of the testator's property passed by the ninth clause. [*Mitford* v. *Reynolds*] 105

6. In 1814 estates were limited to such uses, &c. as A. should appoint, and, in default of appointment, to him for life, remainder to his son for life, remainder to the son's first and other sons in tail male: and those limitations were followed by powers of leasing, and selling and exchanging, the latter

of which was to be exercised during the life of A. and his son, and with their consent. In 1830, A. being desirous of relinquishing his life-interest, appointed the estates to his son for life, remainder to the uses, upon the trusts and *subject to the powers* expressed and contained in the deed of 1814, *ulterior to* the limitations therein for the lives of A. and his son. Held that, though the power of sale and exchange was to operate *in derogation of* the life-estates, it was not destroyed by the deed of 1830. [*Morgan* v. *Rutson*] 234

7. A testator being underlessee, for a long term of years, of two houses in Gower Street numbered 63 and 64, and being possessed of two other houses in that street, numbered 67 and 76, for the residues of certain terms for years, bequeathed them to trustees in trust for D. C. for her life, remainder in trust, as to 63, 64 and 67, for his half-brothers and half-sisters (whom he named) and the survivors and survivor of them for their, his or her lives or life, remainder in trust to sell and divide the proceeds amongst their children living at the death of the survivor of them; and, as to number 76, in trust, after the decease of D. C., for his niece S. C., for life, remainder in trust for her children who should survive her, and, in default of such children, upon the same trusts as he had declared of the other houses after the death of D. C.; and he gave the residue of his effects to D. C., and appointed her his executrix. The testator, some years after the date of his will, took an assignment of the original lease, which comprised numbers 62 and 65 as well as 63 and 64: and, a few months afterwards, made a codicil, by which he confirmed his will. He, subsequently, made another codicil, which was, in part, as follows: "I also give, subject to her life estate, one moiety of the residue of my estate, unto and amongst my nephews and nieces living at my decease, payable in like manner as, by my will, is directed concerning their shares and interests in the reversion of my houses in Gower Street, except that their shares and interests in the said moiety, is to depend, solely, on the decease of my executrix." D. C. and all the testator's half-brothers and half-sisters, died before the suit was commenced. Held that, though the bequest, in the will, of numbers 63 and 64, was adeemed by the testator taking an assignment of the original lease, the effect of the last-mentioned codicil was to entitle the children of the testator's half-brothers and half-sisters who were living at the decease of the survivor of them, to the testator's interest in numbers 63 and 64, *as it existed at his death.* [*Porter* v. *Smith*] 251

8. A testator, by his will dated after the recent Will Act had come into operation, expressed himself thus: "And, as to all, and singular the residue and remainder of my messuages, lands and hereditaments, whatsoever and wheresoever, and of what tenure or nature soever, and, generally, all the freehold, copyhold, and leasehold estates whereof *I am now seised or possessed:*" and, in a subsequent part of his will, he used these words: "I give to my nephew, all such manors, farms, &c. as well freehold as copyhold and leasehold, as are now vested in me, or, as to the

said leasehold premises, *as shall be vested in me, at the time of my death*, as a trustee; to hold, unto and to the use of my said nephew, his heirs, executors, &c., upon the like trusts as the same *are now or shall be vested in me.*" The testator purchased a freehold estate after the date of his will. Held that the will could not be construed to speak and take effect, with reference to the estates to which the testator died beneficially entitled, as if it had been executed immediately before his death. [*Cole* v. *Scott*] 259

9. Testator devised estates to trustees, in trust to pay 300*l.* a-year *for the maintenance, clothing, and education* of his son's children, during the life of their father. The son had three children, all of whom attained twenty-one, and, then, one of them died. Held that the personal representative of the deceased child was entitled to one-third of the 300*l.* a-year during the father's life. [*Lewes* v. *Lewes*] 266

10. Testator gave one-third of his residue in trust for his sister, the interest to be paid to her during her life, and the principal, at her death, to go to *the heirs of her body share and share alike.* The sister had five children living at the testator's death. Held, from the context of the will, that she took for life, with remainder *to her children* as tenants in common. [*Symers* v. *Jobson*] . . . 267

11. Testator bequeathed 5000*l.* in trust, to pay the interest to his nephew John, for life, remainder to John's first son for life, remainder as to the principal, for the children of John; and for default of such issue to pay the interest to the second and other sons of John successively and to their respective issue; and, *for default of issue male of John*, to pay the interest to the testator's nephew Charles for life, &c. &c. Held that the words in italics, did not mean: "if John shall never have a son," so as to make the limitation to Charles take effect by way of substitution, but that *that* and all the other limitations subsequent to the limitation to the first son of John, were void for remoteness. [*Burley* v. *Evelyn*] 290

12. The words: "legal representative or representatives," in a will, held to mean, not: "executors or administrators," but: "next-of kin." [*Walker* v. *The Marquis of Camden*] 329

13. Testator devised a manor and farm to A. and B. and their heirs to the use of his son for life, remainder in trust that the trustees, or the survivor of them, should pay and apply the rents and profits, or so much thereof as they or he should think proper, for the maintenance of his son's younger children during their minorities, and after all those children should have attained twenty-one, to the use of them, their heirs and assigns. Held that A. and B. did not take the legal estate in fee in the devised premises; but that the son took the legal estate for his life, with remainder to A. and B. for a chattel-interest, with remainder to the son's younger children in fee. [*Tucker* v. *Johnson*] . . . 341

14. Trustees under an Act of Parliament for dividing and inclosing a common, held to be a corporation, by implication [*Newport Marsh Trustees, Ex parte*] . . . 346

15. Testator bequeathed a leasehold

estate to his son Charles; and directed that, if his son should die without issue, the leasehold estate should be considered as part of his residuary estate, and be divided amongst the children of his three daughters, Isabella, Matilda and Mary, as thereinafter mentioned. And he gave the residue of his estate, to trustees, in trust for his son and three daughters, *or such of them as should be living at the death of his wife*, equally, during their lives: and he directed that, after their deaths, the whole of the residue, should be divided amongst *all the children of his said son and daughters*, in equal parts, shares, and proportions; and, in case any of his said son and daughters should die without leaving *issue*, that the share of him, her or them so dying, should be divided amongst *the survivor or survivors* of his said children *and their issue*, in the like equal parts, shares and proportions. *Isabella died in the lifetime of the testator's widow*, leaving children. Mary died after the widow, leaving children. Then Charles died without issue. Matilda was still living, and had children. Held that Isabella's children were entitled to one-fourth of the residue notwithstanding their mother died before the widow; that Mary's children were entitled to another fourth; and that Matilda was entitled to another fourth, for her life, with remainder to her children; and that, as Charles had died without issue, the remaining fourth was divisible into three parts, and one of those parts belonged to Isabella's children, another, to Mary's children, and the remaining part to Matilda for life, with remainder to her children. [*Hawkins* v. *Hamerton*] . 410

16. Testator, by his will, gave an annuity to A. B. and directed his executor to pay it, out of his £3 per Cent. Consols. By a codicil he gave A. B. 30*l.* besides her annuity, and willed that the fund constituting her annuity, after her decease, *should be transferred to Joseph and Isaac N. or to the survivor or survivors of them in equal shares.* Isaac survived Joseph, but died before A. B. Held that he became entitled to the whole of the fund. [*Antrobus* v. *Hodgson*] 450

17. Testator gave 1000*l.* to his sister for her, *or* for her children's *sole* use and benefit for ever; and directed his executors to pay the same to her as soon as practicable. Held that the word 'or' was to be taken, disjunctively, and that the testator intended his sister to take the 1000*l.* absolutely and exclusively, (but not for her separate use,) if she survived him; but, if she did not, that it should go to her children. [*Chipchase* v. *Simpson*] 485

18. Testator gave all the property he possessed in the parish of K., consisting of houses, lands, debts, ready money and other effects which he then possessed or might possess at the time of his decease, and also all his funds in the bank of England or that of the United States of America, to his reputed children, Anthony, James, and Richard, and their heirs, share and share alike, as soon as they should have attained twenty-one: it being his will that if one of them should die before he attained that age, his share *should vest in and belong to the survivors.* James died under twenty-one leaving Anthony and Richard surviving. Held that the share of the testator's property, which James would have

been entitled to if he had attained twenty-one, vested in Anthony and Richard, as joint-tenants. [*Jones* v. *Hall*] 500

19. Testator devised his real estates to trustees, in trust to convey them to his children, as tenants in common, on their attaining twenty-one; and, in case of the death of any of them, without issue, under that age *or before they should acquire vested interests* therein, he directed the trustees to convey the shares of those so dying, to the survivors of them and their heirs, in equal shares: but in case any of his children should die *at any time either before or after him*, having issue, then he directed the trustees to convey the shares of those so dying, to the issue whom they should have, in equal shares, and to their respective heirs, on their attaining twenty-one. The testator had several children, all of whom attained twenty-one. Held that their shares of his estates became absolutely vested in them in fee, on their attaining twenty-one. [*Wheable* v. *Withers*] . . 505

20. Testator gave the residue of his personal estate to trustees in trust for his wife for life, and after her death, to his daughter, who was an infant at his death: "the same to be always considered as vested in her upon her attaining twenty-one, and to be subject to her disposition thereof;" and, by a subsequent clause, the testator gave the property over, in case his daughter should die under twenty-one, *or without disposing of the property by her will*. Held that the daughter was entitled to the property, not absolutely, but only for life with a power to dispose of it by will. [*Borton* v. *Borton*] . . . 552

21. A. demised lands to B. and C. in trust to permit his wife *and such person and persons, and their executors and administrators, as she should, by her will, bequeath the same to*, to take to his and their own use, the rents of the lands, during the term, exclusively, and notwithstanding his wife's then or any future coverture, and not to be subject to the control or disposal of any future husband: and A. covenanted for the quiet enjoyment of the lands, by his wife, during the term. Held that the wife was the *cestui que trust* of the lands for the whole of the term, and not, merely, for so many years of it as she should live, with remainder to such persons as she should appoint by her will. [*Glover* v. *Hall*] 568

22. Testator devised his freehold estates to A. and B. and their heirs, in trust to permit his wife to hold and enjoy the same and to receive the rents thereof for her life; and, after her decease, in trust to permit his nephew, his heirs and assigns to hold and enjoy the estates and to receive the rents thereof for ever, but subject to the payment of 20*l*., yearly for ever, to his niece, *her executors, administrators and assigns;* with the payment of which sum the testator made chargeable his said estates, *in manner and form aforesaid*, immediately after the decease of his wife. Held that the niece took a legal *rent-charge*, of 20*l*. per annum, *in fee*. [*Ramsey* v. *Thorngate*] 575

See ACCUMULATION.—ANNUITY, 3. APPOINTMENT, 3.—BOND.—CHARITY.—CONVERSION, 2.—DEVISE—EXECUTORY TRUST.—GENERAL BEQUEST.—LEGACY, 2.—REMOTENESS, 1, 2. STAT. 7 Will. 4 & 1 Vict. c. 26.—TENANT FOR

LIFE AND REMAINDERMAN, 2.— TRUST ESTATES. — VESTING.— WILL, 17.

CONTEMPT.

The position laid down in the books of practice, that an attachment cannot have a longer return than the last return of the term following that in which it is issued, is not well founded. An attachment issued in vacation under 11 Geo. IV. & 1 W. IV. c. 36, sect. 15, rule 3, may be made returnable more than fifteen days after it is tested. The party prosecuting process of contempt, is not bound to bring the prisoner to the bar of the Court, in order that he may be turned over to the Queen's Prison. An attachment upheld, although the affidavit on which it was obtained, was sworn fifteen months previously. [*Wroe* v. *Clayton*] 183

CONVERSION.

1. Testatrix, by her will, after expressing an intention to dispose of all her real and personal estate as thereinafter mentioned, gave certain legacies, and appointed A. and B. her executors, and gave, to them and their heirs, all lawful powers and authorities to conduct and manage her freehold estates, so as that the same might, at their discretion, be sold and converted into money, and she directed that the net money should *form part of her personal estate;* and, for those and every other purpose connected with her property whether real or personal, she invested A. and B. and the survivor of them and his heirs, executors and administrators, with her full authority; and she directed that any undisposed of surplus of monies should be paid as she should, by any future writing or will, direct. She did not however, make any future writing or will. After her death, A. and B. sold her real estates. Her personal estate was sufficient to pay her debts and legacies. Held that her heir, and not her next-of-kin, was entitled to the monies produced by the sale. [*Flint* v. *Warren*] 124

2. Testator directed the trustees of his will to sell his real estates and retain 5000*l.* out of the proceeds, and to stand possessed of that sum in trust for A. for life, remainder in trust for A.'s son for life, with divers remainders over, all of which were void for remoteness. And he gave his personal estate, after payment of the legacies thereinafter given, and *the residue of the money to arise by the sale of his real estates* after making good the 5000*l.*, to B. A. died a bachelor. The testator's heir also died. Held that the heir's personal representative was entitled to the 5000*l.* [*Burley* v. *Evelyn*] 290

COPYRIGHT.

The proprietor of an encyclopædia who employs a person to write an article for publication in that work, cannot, without the writer's consent, publish the article in a separate form or otherwise than in the encyclopædia, unless the article was written on the terms that the copyright therein should belong to the proprietor of the encyclopædia for all purposes. [*The Bishop of Hereford* v. *Griffin*] 190

CORPORATION.

1. The Corporation of Norwich restrained from soliciting, at the expense of the borough fund, a bill in

Parliament, to enable them to improve the navigation of the river which flows, through that city, to Yarmouth. [*The Attorney-General* v. *The Corporation of Norwich*] 225

2. Trustees under an Act of Parliament for dividing and inclosing a common, held to be a corporation, by implication. [*Ex parte The Newport Marsh Trustees*] . 346

COSTS.

1. The costs of an interlocutory proceeding are not costs of the suit. [*Finden* v. *Stephens*] . . . 40

2. Two trustees severed in their defence: one was charged with misconduct, but not the other. The Court allowed only one set of costs and gave the whole of them to the innocent trustee. [*Webb* v. *Webb*] 55

3. The costs of employing two Queen's counsel for the plaintiff, at the hearing, allowed; the second Queen's counsel having drawn the bill when he was without the bar. [*Carter* v. *Barnard*] . . . 157

4. A. purchased green-acre for 1000*l.*, in lieu of black-acre which a railway company had taken from him, and for which they had paid 644*l.* into Court. The company were ordered to pay A. the same costs as he would have been entitled to under the 80th section of the Lands Clauses Act, if green-acre had cost 644*l.* only. [*Sheffield and Lincolnshire Railway Act, In re*] . 159

5. Money paid into the bank by a railway company, under the 85th section of the Lands Clauses Act, ordered to be repaid to them, under the 87th section, without any deduction for costs payable, by them, to the land-owner. [*In the matter of the London and Southampton Extension Act*] . . 165

6. All the purposes of a suit having been answered, the plaintiff moved, before answer, that his costs might be taxed and paid by the defendant, and that, thereupon, all further proceedings might be stayed. Motion refused. [*Langham* v. *The Great Northern Railway Company*] 173

7. If a petition is presented under the 10 Geo. IV. c. 56, or under the 11 Geo. IV. & 1 Will. IV. c. 60, to have a person appointed to convey property in the place of a recusant trustee, the latter ought not to be served with the petition, and, if he is served, he will be entitled to his costs. [*Ex parte Armstrong and Shallcross*] 296

8. A notice of motion to dismiss the bill in this cause for want of prosecution, was given before the Vice-Chancellor of England, although the suit was attached to the Court of Vice-Chancellor Knight Bruce. The Vice-Chancellor gave the plaintiff costs as of an abandoned motion. [*Rashleigh* v. *Mount*] 390

9. If a plaintiff dismisses his bill, the defendant, though a pauper, is entitled to *dives* costs. [*Rubery* v. *Morris*] 433

See LANDS CLAUSES CONSOLIDATION ACT, 3.

COUNSEL.

The costs of employing two Queen's counsel for the plaintiff, at the hearing, allowed; the second Queen's counsel having drawn the bill when he was without the bar. [*Carter* v. *Barnard*] . . . 157

COVENANT.

The eight children of A., being en-

titled to a fund, equally, in the event of their surviving B., seven of them, in pursuance of an arrangement made amongst themselves whilst the eighth, whose name was James, was in India, executed a deed, by which they and he were made to covenant with each other reciprocally, that, in case any of them should die in B.'s lifetime leaving a child or children, such child or children should be entitled to the share or shares of his, her, or their parent or parents, in such and the same manner as if such parent or parents had survived B. —James never executed the deed; but he and six of those who did execute it, survived B. The other left children, and those children claimed to be entitled, under the deed, to their parent's share. Held that the deed was made upon the assumption that all the persons named as parties, would execute it, and, as one of them had not executed it, it was not binding upon the others, though they had executed it. [*Peto* v. *Peto*] . 590

DAY TO SHOW CAUSE.

See INFANT, 2.

DEBENTURE.

See RAILWAY DEBENTURE.

DEBT.

A. having a reversionary interest, in personalty which he had mortgaged first to B. and next to C., agreed to sell it to D. for 1500*l.*, and D. having, at his request, paid off B., out of the 1500*l.*, he agreed that, until the sale should be completed, D. should stand in the place of B., and have the full benefit of her security. Held that B.'s debt was extinguished by the payment made to her by D.; and, consequently, that D. was not entitled to priority over C. [*Watts* v. *Symes*]. 640

DEBTOR AND CREDITOR.

1. It is not sufficient for a creditor who seeks to set aside a voluntary settlement made by his debtor, to show, merely, that the settlor was indebted when he executed the settlement; but it is not requisite for him to show that the settlor was *insolvent* at that time. [*Scarf* v. *Soulby*] 481
2. A. being greatly in debt, he and his father, in pursuance of an arrangement between themselves, conveyed estates of which they were seised for life and in remainder respectively, to trustees in trust to sell for payment of A.'s debts; but no creditor was to be entitled to the benefit of the trust, unless the trustees, after having investigated and allowed his debt, should give him a debenture for it. The trustees gave debentures to three of the creditors: after which one of the trustees instituted a suit against his cotrustees, &c., on the hearing of which the Master was directed to take an account of *all* A.'s debts due at the date of the conveyance, and to advertise for his creditors to prove their debts by a day to be named or *be excluded from the benefit of the decree.* The plaintiff and several other creditors of A. proved their debts under the decree; but, nevertheless, the Court, on the hearing for further directions, held that none of them, except the plaintiff and the debenture creditors, were entitled to the benefit of the trust. [*Drever* v. *Mawdesley*] 511

3. A. having gone abroad and left his wife unprovided for, the plaintiff lent her money to purchase necessaries, and she applied it accordingly. Held that the plaintiff could not sue A. for the money, in a Court of Equity. [*May* v. *Skey*] 588

DECREE.

1. At the hearing of a cause to which an infant, who was the first tenant in tail under a settlement, was a defendant, the Court made a declaration as to the intention of the parties to the settlement, which bound the infant's inheritance, and sent a case for the opinion of a Court of Law as to the true construction of the settlement; but, it refused to give the infant a day to show cause against the decree until the hearing on the equity reserved, when it would appear whether the infant would be required to execute a conveyance or not. [*Walsh* v. *Trevannion*] 180
2. Petition to rectify what was alleged to be an error or mistake in a decree, dismissed. [*Stewart* v. *Forbes*] 433

DEED.

1. A. being seised of estates in C., and having proposed to settle a certain part of them on his marriage, a settlement was made of all his estates in C, which were intended to be specified and described in the schedule thereunder written, "*but which schedule is not intended to abridge or affect the generality of the description hereinbefore contained.*" Held, from the proposal and other evidence, that the words in italics, were inserted by mistake. [*Walsh* v. *Trevannion*] 178
2. In 1814 estates were limited to such uses, &c. as A. should appoint, and, in default of appointment, to him for life, remainder to his son for life, remainder to the son's first and other sons in tail male; and those limitations were followed by powers of leasing, and selling and exchanging, the latter of which was to be exercised during the life of A. and his son, and with their consent. In 1830, A. being desirous of relinquishing his life-interest, appointed the estates to his son for life, remainder to the uses, upon the trusts and *subject to the powers* expressed and contained in the deed of 1814, *ulterior to* the limitations therein for the lives of A. and his son. Held that, though the power of sale and exchange was to operate *in derogation of* the life-estates, it was not destroyed by the deed of 1830. [*Morgan* v. *Rutson*] . . . 234
3. A. demised lands to B. and C. in trust to permit his wife, *and such person and persons, and their executors and administrators, as she should, by her will, bequeath the same,* to take to his and their own use, the rent of the lands, during the term, exclusively, and notwithstanding his wife's then or any future coverture, and not to be subject to the control or disposal of any future husband: and A. covenanted for the quiet enjoyment of the lands, by his wife, during the term. Held that the wife was the *cestui que trust* of the lands for the whole of the term, and not, merely, for so many years of it as she should live, with remainder to such persons as she should appoint by her will. [*Glover* v. *Hall*] 568
4. The eight children of A., being entitled to a fund, equally, in the

event of their surviving B., seven of them, in pursuance of an arrangement made amongst themselves whilst the eighth, whose name was James, was in India, executed a deed, by which they and he were made to covenant with each other, reciprocally, that, in case any of them should die in B.'s lifetime leaving a child or children, such child or children should be entitled to the share or shares of his, her, or their parent or parents, in such and the same manner as if such parent or parents had survived B.—James never executed the deed; but he and six of those who did execute it, survived B. The other left children, and those children claimed to be entitled, under the deed, to their parent's share. Held that the deed was made upon the assumption that all the persons named as parties, would execute it, and, as one of them had not executed it, it was not binding upon the others, though they had executed it. [*Peto* v. *Peto*] 590

See CHARITY.

DEFENDANT.

1. Leave given, to a defendant, to file a supplemental answer, notwithstanding the information which he wished to avail himself of, had been obtained through a violation of professional confidence. [*Raincock* v. *Young*] 122
2. Injunction granted to restrain a joint action brought by A. B. C. D. and E. A. B. and C. put in a joint answer, and afterwards dissolved the injunction as against themselves. D. and E. then put in their answer, but would not move to dissolve the injunction as against themselves, although it was competent to them so to do. The Court on a motion made by A. B. and C., without notice to D. and E., dissolved the injunction against D. and E. [*Macgregor* v. *Cunningham*] 365

See INJUNCTION, 4.

DELIVERY UP OF A WRITTEN INSTRUMENT.

Bill filed by the underwriter of a policy of insurance on a ship, to have the policy delivered up, on the ground of deviation and unseaworthiness; but only deviation was proved. Bill dismissed. [*Thornton* v. *Knight*] 509

DEMURRER.

See JOINT-STOCK COMPANY.

DEPOSIT.

See LANDS CLAUSES CONSOLIDATION ACT, 2 & 3.

DEPOSITIONS.

Witnesses were examined, for a defendant, *under a commission* in the country. Twenty days after publication, the plaintiff served a notice of motion to suppress the depositions, because no notice of the names, &c., of the witnesses had been given to her. Motion refused on account of the delay in serving the notice, and because the plaintiff's solicitor was present during the execution of the commission, at the inn at which it was executed, knew what was taking place, and saw and conversed with the witnesses. [*Smith* v. *Pincombe*] 497

DESTRUCTION OF DEEDS.

A mortgagee having inadvertently

burnt the mortgage-deed and the documents relating to the title to the mortgaged estate, some of which were originals and others attested and office copies, was ordered, in a foreclosure-suit, not only to procure fresh attested and office copies, but to make compensation *for the damage done to the estate* by the destruction of the deeds, the amount to be settled by the Master and deducted from the mortgage-debt. [*Hornby* v. *Matcham*] 325

DEVISE.

Testator devised all his houses in Southwold, to trustees, in trust for his wife for life, and, after her death, in trust to convey one of them, whichever she might think proper to choose, to his daughter, Maria, and her heirs, and to convey all the other of them, to his daughter, Charlotte, in fee. Maria died in the testator's lifetime, and, consequently, without having chosen any one of the houses. Charlotte survived the testator. A general demurrer to a bill filed, by the testator's heir, to have *all* the houses conveyed to him, was overruled. [*Boyce* v. *Boyce*] . 476

DISMISSAL.

A cause was put at issue, according to the old practice, more than two months before the Orders of May 1845, came into operation, but no further proceeding was taken in the cause. Held that the defendant could not move to dismiss the bill for want of prosecution, under the 114th Order, section 4; but must set down the cause for hearing according to the old practice. [*Griffith* v. *Griffith*] 35

See COSTS, 9.

DISSENTERS.

In 1704, Lady Hewley, an English Protestant Nonconformist, conveyed estates in England, to trustees (all of whom appeared to be resident in England, and some of whom at least were Protestant Nonconformists,) in trust, for such poor and godly preachers for the time being of Christ's Holy Gospel, and of such poor and godly widows for the time being of such preachers, as the trustees for the time being should think fit; for promoting the preaching of Christ's Holy Gospel in such manner and in such poor places as the trustees for the time being should think fit; for educating such young men designed for the ministry of Christ's Holy Gospel as the trustees for the time being should think fit; and for relieving such godly persons in distress, being fit objects of her own and the trustees' charity, as the trustees for the time being should think fit; and she directed that the trustees for the time being, should, in their dispositions and distributions of the aforesaid charities, have a primary respect to such objects thereof as aforesaid as were then and should afterwards be in York, Yorkshire or other northern counties in England, not excluding those in other places and counties, as the trustees for the time being, from time to time, should think fit. Held, by the Vice-Chancellor, that orthodox, English dissenting ministers and members of congregations, essentially and substantially, in doctrine and discipline, of the same sort as the orthodox dissenting congregations which existed in England, in 1704, and, therefore, that orthodox,

English dissenting ministers and members of Baptist, Independent or Congregational, and Presbyterian congregations in England, *which were not in connexion with or under the jurisdiction either of the Kirk or of the Secession-church of Scotland*, were alone entitled to participate in the benefits of the charity; and that such of the trustees as were members of Presbyterian congregations in England which were in connexion with the Kirk, or with the Secession-church, ought to be removed. The last-mentioned trustees appealed from his Honour's decree; and, after the appeal had been opened, but before the argument was concluded, a decree was drawn up, at the request of the defendants and with the approbation of the Attorney-General and the sanction of the Lord Chancellor, in terms which admitted the ministers and members of Presbyterian congregations in England in connexion with the Kirk and the Secession-church of Scotland, to participate in the administration and benefits of the charity. [*The Attorney-General* v. *Wilson*] 210

DIVIDEND.

See BONUS.

EJECTMENT-BILL.

Plea to an ejectment-bill, that the defendant was seised in fee, and that there were no outstanding terms, no mortgages or incumbrances, and no unexpired leases. Held not to be bad on the ground of duplicity. [*Dawson* v. *Pilling*] . . . 203

ENCYCLOPÆDIA.

The proprietor of an encyclopædia who employs a person to write an article for publication in that work, cannot, without the writer's consent, publish the article in a separate form or otherwise than in the encyclopædia, unless the article was written on the terms that the copyright therein should belong to the proprietor of the encyclopædia, for all purposes. [*The Bishop of Hereford* v. *Griffin*] . . . 190

ENJOYMENT IN SPECIE.

Testator having devised his real estates in strict settlement, bequeathed his personal estate, in trust, as far as the nature of it would admit, for the persons who, for the time being, might have the ownership and be in the possession of his real estates under the limitations of his will; and then directed that those persons, *under letters of attorney and powers from the trustees* (*which he empowered and required them to grant*) *should receive the yearly dividends which might arise out of the public or other funds, and the yearly interest which might arise from other parts of his personal property*, under the same restrictions and limitations and to the same extent on which they held his real estates. Held that the testator's personal estate was to be enjoyed *in specie*, notwithstanding it consisted, in part, of Long Annuities and Bank Stock. [*Neville* v. *Fortescue*] . . 333

EXECUTORS AND ADMINISTRATORS.

1. By the decree in a suit instituted by persons beneficially interested under a will, one object of which was to charge two of the executors with a debt which the third (who had become insolvent) owed to the

testator at his decease, an inquiry was directed, at the suggestion of the solvent executors, whether, if they had taken measures to call in the debt, it could have been recovered: but neither they nor the Plaintiffs prosecuted the inquiry. On the hearing for further directions, the Court held that the solvent executors ought to have prosecuted the inquiry, notwithstanding they must have proved a negative; and, as they had not done so, it ordered them to pay the amount of the debt into Court, with interest from the testator's death. [*Stiles* v. *Guy*] 230

2. Colonial letters of administration will entitle the administrator to sue in this country, in respect of a sum of stock standing in the names of trustees, to a share of which the intestate was entitled [*M'Mahon* v. *Rawlings*] 429

See CONSTRUCTION, 12. — NEGATIVE PLEA.—NEW ORDERS, 3.—PRACTICE, 3.

EXECUTORY TRUST.

Testator directed an estate to be purchased with his residuary personal estate, and made hereditary and settled upon his there constituted heir, and then to *descend* to his heirs, or, dying without issue, as he should then provide for. The testator then constituted his nephew W. S. his heir and successor, and directed the estate, when purchased, to be *settled on W. S. his heirs and successors in the direct male line*, lawfully begotten and born in wedlock; and in case W. S. should die without issue, the estate to devolve to his brother F. S., his heirs and successors, lawfully begotten and born in wedlock in the direct male line. The testator then declared that his object, intent, desire and command was *that the estate should never pass out of his family, and that no person should hold it under any other name than the one he bore of Shelton.* The Court directed the estate to be settled on W. S. *for life*, with remainder to his first and other sons in tail male; with like remainders to F. S. for life and to his first and other sons, in tail male. [*Shelton* v. *Watson*] . 543

EXTINGUISHMENT.

See MORTGAGOR AND MORTGAGEE, 2.

FAMILY ARRANGEMENT.

See DEBTOR AND CREDITOR, 2.—DEED, 4.

FORFEITURE.

See CHARITY, 1.

FRAUD.

Two years and a half after a young lady had come of age, A., who had been her guardian, and with whom she still resided, drew a promissory note in her favour, and she, at his request, indorsed it. Shortly afterwards, a third person paid the note to his bankers, (who knew that A. was insolvent and had been the young lady's guardian,) and they, on the faith of the indorsement, paid a cheque which he had drawn in favour of A. The Court restrained the bankers from suing the young lady on the note, and would not order her to pay the amount of it into Court. [*Maitland* v. *Backhouse*] 58

GENERAL BEQUEST.

A bequest of all the property that

the testator might die possessed of, held, from expressions in a codicil of even date, to pass only a part of the testator's property. [*The Attorney-General* v. *Wiltshere*] . 36

GRAMMAR-SCHOOL.

The Statutes of Manchester Free Grammar-School declared that the master and usher (for whom stipends were provided by the foundation-deeds) should teach, freely and indifferently, every scholar coming to the school, without any money or other rewards taken therefore; that no scholar, of what county or shire soever, should be refused; that no scholar should bring meat or drink into, nor should any one lodge in the school; that vacancies in the trusteeship should be supplied by honest gentlemen and honest persons within the parish of Manchester: and that the trustees should have full power to augment, increase, expound and reform the provisions of the Statutes only concerning the schoolmaster, usher and scholars. The master and usher had, for several years, taken boarders, and the boarders had participated in all the benefits of the charity; and the trustees of the school had been, generally, noblemen and gentlemen residing, not in the parish of Manchester, but in Lancashire and the adjoining counties. Held that the master and usher ought not to be allowed to take any more boarders; and that the trustees thereafter to be appointed ought to be honest gentlemen and honest persons residing within the parish of Manchester, and that persons who occupied and carried on business in manufactories, &c., in the town or parish, and had dwelling-places within six miles of the school-house, were to be considered as being within the parish, for the purpose of their being eligible to be trustees. [*The Attorney-General* v. *The Earl of Stamford*] 453

GUARDIAN AND WARD.

See FRAUD.

HEIR.

Testator devised all his real estate to his widow. Held, (overruling *Brown* v. *Weatherby*, *ante*, Vol. XII. p. 6,) that his heir was not a necessary party to a suit to administer his real estates under 3 & 4 Will. IV. c. 104. [*Bridges* v. *Hinxman*] 71

See ACCUMULATION, 2.

HEIR AND NEXT-OF-KIN.

Testatrix, by her will, after expressing an intention to dispose of all her real and personal estate as thereinafter mentioned, gave certain legacies, and appointed A. and B. her executors, and gave, to them and their heirs, all lawful powers and authorities to conduct and manage her freehold estates, so as that the same might, at their discretion, be sold and converted into money, and she directed that the net money should *form part of her personal estate;* and, for those and every other purpose connected with her property whether real or personal, she invested A. B. and the survivor of them and his heirs, executors and administrators, with her full authority; and she directed that any undisposed-of surplus of monies should be paid as she should, by any future writing or will, direct.

She did not, however, make any future writing or will. After her death, A. and B. sold her real estates. Her personal estate was sufficient to pay her debts and legacies. Held that her heir, and not her next-of-kin, was entitled to the monies produced by the sale. [*Flint* v. *Warren*] 124

HEIR AND RESIDUARY LEGATEE.

Testator directed the trustees of his will to sell his real estates and retain 5000*l.* out of the proceeds, and to stand possessed of that sum in trust for A. for life, remainder in trust for A.'s son for life, with divers remainders over, all of which were void for remoteness. And he gave his personal estate, after payment of the legacies thereinafter given, and *the residue of the money to arise by the sale of his real estates*, after making good the 5000*l.* to B. A. died a bachelor. The testator's heir also died. Held that the heir's personal representative was entitled to the 5000*l.* [*Burley* v. *Evelyn*] . . . 290

HUSBAND AND WIFE.

1. A sum of stock was vested in a trustee in trust for A. for life, remainder in trust for his wife, absolutely. A. became bankrupt; and his assignees sold his life-interest to E. Some years afterwards, E., for valuable consideration, assigned the life-interest to the wife. And, on her appearing in Court and consenting, the Vice-Chancellor ordered the trustee to transfer the fund to her husband. But the Lord Chancellor, in a subsequent case, overruled the principle of the decision. [*Bishop* v. *Colebrook*] 39

2. A female infant being entitled, under a will, to 1000*l.* and to the reversion of 2000*l.* expectant on her father's death, covenanted with the trustees of her marriage articles, to do all necessary acts when she should attain twenty-one, for vesting those sums in the trustees, upon the trusts of the articles. Shortly before the infant attained twenty-one, the executors of the will, without any direction from her or her husband, transferred a sum of stock in which the 1000*l.* had been invested, to the trustees of the articles. Afterwards the husband died leaving his wife and her father surviving. Held that the transfer to the trustees, was a reduction into possession, and, therefore, that the 1000*l.* was bound by the articles; but that the wife was entitled, by survivorship, to the 2000*l.*, subject to her father's life-interest. [*Cunningham* v. *Antrobus*] 436

See MARRIAGE ARTICLES.

INCOME OR CAPITAL.

See BONUS.

INFANT.

1. A female infant, entitled to a fund in Court, was resident abroad, with a guardian appointed by a foreign Court. The Vice-Chancellor ordered the dividends of the fund to be paid to her solicitor, he undertaking to remit them to the guardian. [*In re Morrison, an Infant*] 42

2. At the hearing of a cause to which an infant, who was the first tenant in tail under a settlement, was a defendant, the Court made a declaration as to the intention of the parties to the settlement, which

bound the infant's inheritance, and sent a case for the opinion of a Court of Law as to the true construction of the settlement; but, it refused to give the infant a day to show cause against the decree until the hearing on the equity reserved, when it would appear whether the infant would be required to execute a conveyance or not. [*Walsh* v. *Trevannion*] 180

See CHOSE IN ACTION, 1, 2.

INJUNCTION.

1. The word "trial," in an order to extend the common injunction, means the trial of an issue of fact, and not of a question of law raised by demurrer. [*Lowe* v. *Faulkner*] 250
2. Injunction granted, before answer, to restrain defendants from parting with documents in their possession, belonging to the plaintiff, and from preventing the plaintiff and her solicitor from having access to the documents at all reasonable times and after reasonable notice. [*Goodale* v. *Goodale*] 316
3. Injunction granted to restrain a joint action brought by A. B. C. D. and E. A. B. and C. put in a joint answer, and afterwards dissolved the injunction as against themselves. D. and E. then put in their answer, but would not move to dissolve the injunction as against themselves, although it was competent to them so to do. The Court on a motion made by A. B. and C., without notice to D. and E. dissolved the injunction against D. and E. [*Macgregor* v. *Cunningham*] 365
4. A defendant cannot move to dissolve an injunction absolutely, in the first instance, notwithstanding the time at which his answer was to be deemed sufficient, has long since passed. [*Raincock* v. *Young*] 566
5. A. obtained a special injunction, until answer or further order, in a suit in which he was sole plaintiff; and then amended the bill by making B. a co-plaintiff. Held that the injunction was gone by the amendment. [*The Attorney-General* v. *Marsh*] 572

INQUIRY.

See EXECUTORS AND ADMINISTRATORS, 1.

INSOLVENT.

In January 1848, A. gave B. a bill of sale of his household furniture, to secure a debt due from him to B. On the 21st of February 1849, B. took possession of the furniture, and advertised it for sale. On the 8th of March following, a petition presented by A. under the Insolvent Debtors' Act, for protection from process, was filed. The Vice-Chancellor held that, though the bill of sale was unaffected, yet B.'s right to retain possession of the furniture was defeated. The Lord Chancellor, on appeal, directed B. to bring an action to try his right to the furniture. [*Parrott* v. *Congreve*]. 579

INTEREST.

1. After the death of a person who had covenanted to pay an annuity, a suit was instituted for the administration of his assets, pending which the annuity became in arrear. The Court refused to allow interest on the arrears. [*Jenkins* v. *Briant*] 272
2. A testator, who died in 1823, directed the trustees of his will to raise a legacy by sale of his real

estates. Held that the legatee was not barred by the 42nd sect. of the Statute of Limitations (3 & 4 Will. IV. c. 27) from claiming interest on the legacy from the end of the first year after the testator's death. [*Gough* v. *Bult*] 323

3. Interest at four per cent. allowed to the tenant for life of a trust fund upon the amount found due to her for arrears of interest of the fund. [*Willcocks* v. *Butcher*] . . 366

ISSUE.

See CONSTRUCTION, 3.—WILL, 22.

JOINT-STOCK COMPANY.

1. Demurrer allowed to a bill filed by Plaintiffs on behalf of themselves and the other shareholders in a company, because the bill did not allege that the plaintiffs were shareholders in the company. [*Banks* v. *Parker*] 176

2. A joint-stock company cannot hold shares in a benefit building society established under 6 & 7 Will. IV. c. 32, for regulating benefit societies. [*Dobinson* v. *Hawks*] . . 407

See JURISDICTION, 1.—RAILWAY DEBENTURE.

JOINT-TENANCY.

At the death of a testator, two sums of stock, which had been purchased by him and his sister, were standing in their joint names. One had been purchased by them equally: but much the greater part of the other had been purchased by the sister, who was still living. Held that the sister was entitled, by survivorship, to both sums. [*Harris* v. *Fergusson*] 308

See WILL, 25.

JURISDICTION.

1. The jurisdiction of the Court is not affected by the 9 & 10 Vict. c. 28, for facilitating the winding-up of certain railway companies. [*Jones* v. *Lord Charlemont*] 271

2. Petition to rectify what was alleged to be an error or mistake in a decree, dismissed. [*Stewart* v. *Forbes*] 433

3. A. having gone abroad and left his wife unprovided for, the plaintiff lent her money to purchase necessaries, and she applied it accordingly. Held that the plaintiff could not sue A. for the money, in a Court of Equity. [*May* v. *Skey*] 588

4. An attorney, to whom a clerk was articled, died before the articles expired. Held that the Court had jurisdiction to order part of the premium paid to the attorney, to be repaid out of his assets. [*Hirst* v. *Tolson*] 620

See ASSETS.

LANDS CLAUSES CONSOLIDATION ACT.

1. The instrument by which a surveyor is appointed under the 85th sect. of the Lands Clauses Consolidation Act, need not specify either the lands which the surveyor is to value, or the course of the railway. The sureties in a bond to be given to the land-owner, under that section, may be appointed without notice to the land-owner; but the money secured by it ought not to be made payable on demand. The condition of the bond ought to adopt the words of the section, and make the money payable either to the obligee or into the Bank of England, "as the case may re-

quire." Money paid into the bank under the 86th section, to the credit of *Ex parte* the promoters of the undertaking, the account of the land-owner, held to be rightly paid in. [*Poynder* v. *The Northern Railway Company*] 3

2. Money paid into the bank by a railway company under the 85th section of the Lands Clauses Act, ordered to be repaid to them, under the 87th section, without any deduction for costs payable by them to the land-owner. [*In the matter of the London and Southampton Railway Extension Act*, and *Ex parte The Great Northern Railway Company*] . . . . 165 & 169

3. A. purchased green-acre for 1000*l.*, in lieu of black-acre which a railway company had taken from him, and for which they had paid 644*l.* into Court. The company were ordered to pay A. the same costs as he would have been entitled to under the 80th sect. of the Lands Clauses Act, if green-acre had cost 644*l.* only. [*Ex parte Hodge*] 159

4. A land-owner refused to accept purchase-money awarded to be paid to him by a railway company, because he believed the award to be invalid in law. The judges of the Court of Queen's Bench, after hearing the question argued at great length and taking time to consider their judgment, decided that the award was valid. Held that the land-owner's refusal to receive the money, was not a wilful refusal within the meaning of the 80th section of the Lands Clauses Act. [*Ex parte Bradshaw*] . . 174

LEASEHOLDS.

See PLEA AND PLEADING, 6.

LEGACY.

1. Testatrix gave 1000*l.* to her nephew to maintain and bring up her natural son, F. B.; and she directed the interest of one fourth of her residue to be applied for the maintenance and education of F. B. during his infancy, and the capital to be paid to him on his attaining twenty-one. Held that the nephew was not a trustee of the 1000*l.* for F. B., but was entitled to it for his own benefit. [*Biddles* v. *Biddles*] 1

2. Testator ordered and empowered the trustees of his will, at their free will and pleasure, to sell part of the trust-property, and, out of the proceeds, to pay *not exceeding* 2000*l.* to his son, *for setting him up in business, or for such other purposes as the testator's wife should think proper and most beneficial to him.* The son survived the testator, and afterwards died without having entered into business, and without the 2000*l.*, or any part of it, having been raised. A general demurrer to a bill filed, by his personal representative, to have the 2000*l.* raised, was overruled. [*Gough* v. *Bult*] 45

3. Testator gave legacies to different persons, and an annuity for the personal maintenance and support of his brother, and directed the payment of it to commence on the first half-yearly day after his death, and the legacies to be paid at the expiration of two years after that event, or as much sooner as the circumstances of his estate would permit, but, without interest in the meantime. The testator's property was insufficient to pay the legacies and annuity in full. Held that the annuity was not entitled to priority over the legacies, but must abate,

proportionably, with them. [*Ashburnham* v. *Ashburnham*] . 186

4. Testatrix bequeathed her personal estate to trustees, in trust, amongst other things, to pay and apply 800*l.* in and upon the education of her godson, who was an infant. Held that the whole of the 800*l.* was payable at once, with interest from the end of the first year after the death of the testatrix. [*Noel* v. *Jones*] 309

5. A testator, who died in 1823, directed the trustees of his will to raise a legacy by sale of his real estates. Held that the legatee was not barred by the 42nd sect. of the Statute of Limitations (3 & 4 Will. IV. c. 27) from claiming interest on the legacy from the end of the first year after the testator's death. [*Gough* v. *Bult*] 323

6. Testator bequeathed to his daughter, 15,000*l.*, to be kept in trust, by his executors, till she should attain twenty-one or marry with the consent of her mother and half of his executors then living, whichever might happen first, when the sum, with the accumulated interest, *was to be settled* on her. The daughter attained twenty-one, without having married. Held that the legacy was not directed to be settled, except in the event of her marrying under twenty-one, with the consent of her mother and half of the testator's executors; and that, as the legacy was, in the first instance, given to her absolutely, she was entitled to it absolutely. [*Arnold* v. *Arnold*] 404

7. Testator gave 2000*l.* to trustees in trust to pay the interest to his daughter, for life, and, after her decease, in trust *to pay* the principal unto, between and amongst all her children, *as and when they should attain twenty-one*, in equal shares, "*to whom I* give and bequeath the same *accordingly*." The testator's daughter had only one child, and that child died an infant. Held that the 2000*l.* vested in the child on its birth. [*Bartholomew's Trust, In re*] 585

See ANNUITY, 3.—CONSTRUCTION, 7, 9.

LEGAL REPRESENTATIVE, OR REPRESENTATIVES.

See CONSTRUCTION, 12.

LIEN.

After A. had employed Messrs. B. and C. as his solicitors, they took D. into partnership with them and A. employed the new firm. In the course of that employment, papers belonging to him came into their possession. Held that B. and C. had no lien on the papers for costs which A. owed them before they took D. into partnership. [*In re Forshaw*] 121

LONG ANNUITIES.

See TENANT FOR LIFE AND REMAINDERMAN, 2.

MARRIAGE ARTICLES.

A lady married before she attained twenty-one, and, by her marriage articles, she and her husband covenanted to assign a trust fund, in which she had a reversionary interest, to trustees in trust for her and her husband and the children of their marriage. A bill, for a specific performance of the articles, filed, by the children, against their father and mother, after the mother's interest had become an interest in possession, but whilst the fund remained outstanding, was dismissed. [*Borton* v. *Borton*] . . . 552

MARRIED WOMAN.

1. A sum of stock was vested in a trustee in trust for A. for life, remainder in trust for his wife, absolutely. A. became bankrupt; and his assignees sold his life-interest to E. Some years afterwards, E., for valuable consideration, assigned the life-interest to the wife. And on her appearing in Court and consenting, the Vice-Chancellor ordered the trustee to transfer the fund to her husband. But the Lord Chancellor, in a subsequent case, overruled the principle of the decision. [*Bishop* v. *Colebrook*] 39
2. A married woman having power to dispose of a fund by will, made a will disposing of that fund, and also of another fund, over which she had no power, and appointed her husband her executor, and he proved her will generally. Held that, as to the latter fund, the will was valid as being made *ex assensu viri*. [*Fane, Ex parte*] . . 406

See HUSBAND AND WIFE—MARRIAGE ARTICLES.

MINES.

A mortgagee in possession, who had opened and worked mines on the mortgaged estate, charged with his receipts but disallowed his expenses. [*Thorneycroft* v. *Crockett*] . 445

MISTAKE.

A. being seised of estates in C., and having proposed to settle a certain part of them on his marriage, a settlement was made of all his estates in C., which were intended to be specified and described in the schedule thereunder written, "*but which schedule is not intended to abridge or affect the generality of the description hereinbefore contained.*" Held, from the proposal and other evidence, that the words in italics, were inserted by mistake. [*Walsh* v. *Trevannion*] . . 178

MORTGAGOR AND MORTGAGEE.

1. A mortgagee having inadvertently burnt the mortgage-deed and the documents relating to the title to the mortgaged estate, some of which were originals and others attested and office copies, was ordered, in a foreclosure-suit, not only to procure fresh attested and office copies, but to make compensation *for the damage done to the estate* by the destruction of the deeds, the amount to be settled by the Master and deducted from the mortgage-debt. [*Hornby* v. *Matcham*] . . 325
2. A mortgagee in possession, who had opened and worked mines on the mortgaged estate, charged with his receipts but disallowed his expenses. [*Thorneycroft* v. *Crockett*] 445
3. A. agreed to sell an estate to B., for 1400*l.*, of which 400*l.* was to be paid on the execution of the conveyance, and 1000*l.* was to be secured on mortgage of the estate. B. paid A. the 400*l.*, and A. conveyed the estate to him; but kept possession of the conveyance and of the title-deeds. Some time afterwards B. mortgaged the estate to A. for the 1000*l.*; but, in the interim, he had, unknown to A., mortgaged the estate to C.; but C. did not investigate the title to the estate or make any inquiry relative to the title-deeds. Held that A. was entitled to priority over C. [*Worthington* v. *Morgan*] . 547
4. A. having a reversionary interest in personalty, which he had mort-

gaged first to B. and next to C.: agreed to sell it to D. for 1500*l.*; and D. having, at his request, paid off B., out of the 1500*l.* he agreed that, until the sale should be completed, D. *should stand in the place of* B. *and have the full benefit of her security*. Held that B.'s debt was extinguished by the payment made to her by D.; and, consequently, that D. was not entitled to priority over C. [*Watts* v. *Symes*] 640

5. In 1843, A. mortgaged freeholds and leaseholds to B., for 200*l.* In 1845, after reciting that mortgage, he charged the freeholds and leaseholds with the further sum of 400*l.* which he then owed B. and assigned other property, to B., as a further security for that sum, and empowered B. to sell the property and to retain the 400*l.* out of the proceeds. Held that the property assigned in 1845, was redeemable on payment of the 400*l.* only. [*Watts* v. *Symes*] 647

See VENDOR AND PURCHASER.

MORTMAIN.

See RAILWAY DEBENTURE.

MOTION.

The costs of an interlocutory proceeding, are not costs of the suit. [*Finden* v. *Stephens*] . . . 40

MUNICIPAL CORPORATIONS ACT.

See CHARITY.—BOROUGH FUND.

NEGATIVE PLEA.

Where a plaintiff sues as executor, but the probate is insufficiently stamped, the defendant, if he pleads to the bill, ought not to state matters affirmatively in order to show the insufficiency of the stamp, but ought to plead, simply, that the plaintiff is not executor. [*Roberts* v. *Madocks*] 55

See EJECTMENT-BILL.

NEW ORDERS.

A cause was put at issue, according to the old practice, more than two months before the Orders of May 1845 came into operation, but no further proceeding was taken in the cause. Held that the defendant could not move to dismiss the bill for want of prosecution, under the 114th Order, section 4; but must set down the cause for hearing according to the old practice. [*Griffith* v. *Griffith*] 35

2. A cause was put at issue according to the old practice, so long ago as February 1816; but no further step was taken in it until November 1847, when the plaintiff moved to withdraw the replication and file a new one. That motion was refused. In December following the defendant moved to dismiss for want of prosecution. The order then made was that the plaintiff should set down his cause on a given day or the bill be dismissed. Before that day arrived the plaintiff examined witnesses. The defendant then moved that their depositions might be suppressed, on the ground that they had been taken after publication in the cause had passed according to the new Orders of May 1845. The Court refused the motion, and ordered publication to pass on the day before that on which the cause was to be set down. [*Thomas* v. *Lewis*] . 73

3. A cause cannot be set down on an objection for want of parties, under the 39th Order of August 1841, if

the objection is founded on a fact stated in the answer but not in the bill. One of two executors, who were stated to have possessed their testator's assets *jointly*, died before a suit was instituted for the administration of the testator's estate. Held that the representative of the deceased executor, was not a necessary party. [*Clark* v. *Webb*] 161

4. Service of an office copy of the bill, held to be good, notwithstanding the interrogating part was not omitted in the office copy. [*Mason* v. *Best*] 429

See COSTS.—DISMISSAL.

NEXT-OF-KIN.

See HEIR AND NEXT-OF-KIN.—CONVERSION, 1.

OFFICE COPY (SERVICE OF).

Service of an office copy of the bill, held to be good, notwithstanding the interrogating part was not omitted in the office copy. [*Mason* v. *Best*] 429

ONUS PROBANDI.

By the decree in a suit, instituted by persons beneficially interested under a will, one object of which was to charge two of the executors with a debt which the third (who had become insolvent) owed to the testator at his decease, an inquiry was directed, at the suggestion of the solvent executors, whether, if they had taken measures to call in the debt, it could have been recovered: but neither they nor the plaintiffs prosecuted the inquiry. On the hearing for further directions, the Court held that the solvent executors ought to have prosecuted the inquiry, notwithstanding they must have proved a negative, and, as they had not done so, it ordered them to pay the amount of the debt into Court, with interest from the testator's death. [*Styles* v. *Guy*] 230

PARTIES.

1. Testator devised all his real estates to his widow. Held, (overruling *Brown* v. *Weatherby*, *ante*, Vol. XII. p. 6,) that his heir was not a necessary party to a suit to administer his real estates under 3 & 4 Will. IV. c. 104. [*Bridges* v. *Hinxman*] 71

2. A cause cannot be set down on an objection for want of parties, under the 39th Order of August 1841, if the objection is founded on a fact stated in the answer but not in the bill. One of two executors, who were stated to have possessed their testator's assets, *jointly*, died before a suit was instituted for the administration of the testator's estate. Held that the representative of the deceased executor, was not a necessary party. [*Clark* v. *Webb*] 161

3. Testator gave his personal estate and the produce of the sale of his real estates, to trustees in trust for such of his children as should attain twenty-one; and if all of them should die under that age, in trust for the persons who, under the Statutes of Distribution, would then be entitled thereto. The children, all of whom were infants, filed a bill against the trustees, to have the trusts of the will carried into execution: and, after a decree had been made, they filed a *supplemental* bill, against the testater's widow and next-of-kin, praying that they might have the benefit of the decree and

other proceedings in the original suit, against the widow and next-of-kin. Held that the bill ought to have been an original one. [*Roberts* v. *Roberts*] . . 367

4. A bill was filed against A. B., and C. C. was served with a copy of the bill, but died before appearance. Held that an original bill must be filed for the purpose of bringing his personal representative before the Court, and that A. and B. must be made parties to it. [*Foster* v. *Foster*] 637

PATENT.

A patentee filed a bill against a person whom he had licensed to use his invention and the partner of the latter, for an account on the footing of the licence, and for an injunction to restrain the defendants from using the invention in case they should dispute his right to the payments reserved by the licence on the ground that the licence had become void. A general demurrer to the bill was overruled. [*Haddan* v. *Smith and Willey*] 42

PAUPER.

1. A peeress allowed to sue as a pauper. [*Wellesley* v. *Wellesley*] 1
2. A. being executrix of a will and entitled under it to an equity of redemption, filed a bill to redeem, *offering to pay what, if anything, should be found due on the mortgage*, and praying for relief as the testator's representative. Held that she could not sue as a pauper. [*Fowler* v. *Davies*] . . . 182
3. If a plaintiff dismisses his bill, the defendant, though a *pauper*, is entitled to *dives* costs. [*Rubery* v. *Morris*] 433

PEERESS.

See PAUPER, 1.

PERSONAL REPRESENTATIVE.

See COLONIAL REPRESENTATION.—PAUPER.

PETITION.

After a Master's report had been absolutely confirmed, a petition was presented for leave to except to it. The petition was heard with the cause for further directions, and the Court, without directing a reference back to the Master, made an order in accordance with the prayer of the petition. [*Jowett* v. *Board*] 352

See DECREE, 2.

PLEA AND PLEADING.

A patentee filed a bill against a person whom he had licensed to use his invention and the partner of the latter, for an account on the footing of the licence, and for an injunction to restrain the defendants from using the invention in case they should dispute his right to the payments reserved by the licence on the ground that the licence had become void. A general demurrer to the bill was overruled. [*Haddan* v. *Smith and Willey*] 42

2. Where a plaintiff sues as executor, but the probate is insufficiently stamped, the defendant, if he pleads to the bill, ought not to state matters affirmatively, in order to show the insufficiency of the stamp, but ought to plead, simply, that the plaintiff is not executor. [*Roberts* v. *Madocks*] 55
3. Demurrer allowed to a bill filed by plaintiffs on behalf of themselves and the other shareholders in a company, because the bill did not

allege that the plaintiffs were shareholders in the company. [*Banks* v. *Parker*] 176

4. Testator gave his personal estate and the produce of the sale of his real estates, to trustees in trust for such of his children as should attain twenty-one; and if all of them should die under that age, in trust for the persons who, under the Statutes of Distribution, would then be entitled thereto. The children, all of whom were infants, filed a bill against the trustees, to have the trusts of the will carried into execution, and, after a decree had been made they filed a *supplemental* bill, against the testator's widow and next-of-kin, praying that they might have the benefit of the decree and other proceedings in the original suit, against the widow and next-of-kin. Held that the bill ought to have been an original one. [*Roberts* v. *Roberts*] . . . 367
5. Plea to an ejectment-bill, that the defendant was seised in fee, and that there were no outstanding terms, no mortgages or incumbrances, and no unexpired leases. Held not to be bad on the ground of duplicity. [*Dawson* v. *Pilling*] 203
6. The interest of a bankrupt in leaseholds, is not finally divested until *the creditors'* assignees are chosen; and, therefore, if only *the official* assignee has been appointed, the bankrupt cannot plead his bankruptcy to a bill filed against him, to have the trusts of the will under which he took the leaseholds, carried into execution. [*Turner* v. *Nicholls*] 565
7. A bill was filed against A. B. and C. C. was served with a copy of the bill, but died before appearance. Held that an original bill must be filed for the purpose of bringing his personal representative before the Court, and that A. and B. must be made parties to it. [*Foster* v. *Foster*] 637

See HEIR.—NEW ORDERS, 3.—PARTIES, 2.

POLICY OF INSURANCE.

Bill filed by the underwriter of a policy of insurance on a ship, to have the policy delivered up, on the ground of deviation and unseaworthiness; but only deviation was proved. Bill dismissed. [*Thornton* v. *Knight*] 509

PORTIONS.

See ACCUMULATION, 2.

POWER.

1. Testator empowered his executors for the time being, to advance his nephew any sum or sums of money not exceeding 30,000*l*. The executors exercised the power to the extent of 20,000*l*. Held that they were not precluded, thereby, from making a further advance to the nephew. The case of *Brown* v. *Nisbett*, 1 Cox, 13, observed upon. [*Webster* v. *Boddington*] . 177
2. Stock was transferred to trustees in trust for such persons as A. and his wife should jointly appoint; and, in default of appointment in trust, during their joint lives, for the separate use of the wife; and in case A. should die first, in trust for his wife absolutely; but, if she should die first, in trust for him for life, and, subject thereto, in trust for such persons as his wife, notwithstanding her coverture, should, by will, appoint, and, in default of such appointment, in trust for her next-of-kin.

The wife, *in A.'s lifetime*, made a will in exercise of the last-mentioned power. A. died before her. On her death, her will was admitted to probate, but the probate was limited to the property which she *had power* to dispose of. Held that the will was inoperative. [*Price* v. *Parker*] 198

3. The trustees of a marriage settlement were empowered to invest the trust funds in land, and, afterwards, to resell the lands, with the consent of the tenant for life. After the trustees had invested part of the funds in land, the tenant for life conveyed his interest under the settlement, to a purchaser, by the description of all his life and other estate and interest in all the monies, stocks, funds and securities, and messuages, lands, tenements and hereditaments into which the monies, stocks, funds and securities were, or, *at any time thereafter, might be converted and changed.* Held that the tenant for life's power to consent to a resale of the lands, was not destroyed by the alienation of his interest under the settlement [*Warburton* v. *Farn*] . . 625

See WILL, 2, 29.

POWER TO APPOINT TRUSTEES.

A power to appoint a new trustee, on an existing one *becoming incapable* to act, does not apply to the case of a trustee going to reside abroad. [*Withington* v. *Withington*] 104

PRACTICE.

1. A cause was put at issue, according to the old practice, more than two months before the Orders of May 1845, came into operation, but no further proceeding was taken in the cause. Held that the defendant could not move to dismiss the bill for want of prosecution, under the 114th Order, section 4; but must set down the cause for hearing according to the old practice. [*Griffith* v. *Griffith*] . . 35

2. A cause was put at issue according to the old practice, so long ago as Feb. 1816; but no further step was taken in it until Nov. 1847, when the plaintiff moved to withdraw the replication and file a new one. That motion was refused. In December following the defendant moved to dismiss for want of prosecution. The order then made was that the plaintiff should set down his cause on a given day or the bill be dismissed. Before that day arrived, the plaintiff examined witnesses. The defendant then moved that their depositions might be suppressed, on the ground that they had been taken after publication in the cause had passed according to the new Orders of May 1845. The Court refused the motion, and ordered publication to pass on the day before that on which the cause was to be set down. [*Thomas* v. *Lewis*] 73

3. A. being executrix of a will and entitled under it to an equity of redemption, filed a bill to redeem, *offering to pay what, if anything should be found due on the mortgage*, and praying for relief as the testator's representative. Held that she could not sue as a pauper. [*Fowler* v. *Davies*] . . . 182

4. The position laid down in the books of practice, that an attachment cannot have a longer return than the last return of the term following that in which it is issued, is not well founded. An attachment issued in vacation under 11 Geo. IV. 1 Will. IV. c. 36, sect. 15,

rule 3, may be made returnable more than fifteen days after it is tested. The party prosecuting process of contempt, is not bound to bring the prisoner to the bar of the Court, in order that he may be turned over to the Queen's Prison. An attachment upheld, although the affidavit on which it was obtained, was sworn fifteen months previously. [*Wroe* v. *Clayton*] 183

5. A party who moves the Court to enlarge publication after having made an unsuccessful application to the Master, may read affidavits filed subsequently to the proceeding before the Master. [*Peel* v. *Hague*] 315

6. After a Master's report had been absolutely confirmed, a petition was presented for leave to except to it. The petition was heard with the cause for further directions, and the Court, without directing a reference back to the Master, made an order in accordance with the prayer of the petition. [*Jowett* v. *Board*] 352

7. A notice of motion to dismiss the bill in this cause for want of prosecution, was given before the Vice-Chancellor of England, although the suit was attached to the Court of Vice-Chancellor Knight Bruce. The Vice-Chancellor gave the plaintiff costs as of an abandoned motion. [*Rashleigh* v. *Mount*] . . 390

8. Leave given under the circumstances of the case, to examine a witness before the Master, after the decree, as to a matter with regard to which he had been examined before the decree. [*The Duke of Leeds* v. *Lord Amherst*] 431

9. An order giving a defendant liberty to examine a co-defendant as a witness, need not be served on the plaintiff. [*Smith* v. *Pincombe*] 497

10. A defendant cannot move to dissolve an injunction absolutely, in the first instance, notwithstanding the time at which his answer was to be deemed sufficient, has long since passed. [*Raincock* v. *Young*] 566

See COSTS, 7, 8.—DEFENDANT, 2.—INJUNCTION, 2.—NEW ORDERS, 3, 4.—SALE UNDER DECREE.

PREMIUM.

See ARTICLED CLERK.

PRINCIPAL AND AGENT.

The captain of an Indiaman, on arriving at Madras, reported his arrival to the Government-board there, and was directed by them to place himself under the orders of the Commercial Committee at that place. After which he made an offer to the Government-board, through the Commercial Committee, to purchase some cotton belonging to the India Company, at a certain price. The Government-board accepted the offer, conditionally, and wrote a letter to that effect to the Commercial Committee. The plaintiff, on being shown the letter, objected to the condition: in consequence of which the Commercial Committee took upon themselves to dispense with it. Held that the India Company could not enforce the condition against the plaintiff. [*Smith* v. *The East India Company*] 76

PRIORITY.

1. Testator gave legacies to different persons, and an annuity for the personal maintenance and support of his brother, and directed the

payment of it to commence on the first half-yearly day after his death, and the legacies to be paid at the expiration of two years after that event, or as much sooner as the circumstances of his estate would permit, but, without interest in the mean time. The testator's property was insufficient to pay the legacies and annuity in full. Held that the annuity was not entitled to priority over the legacies, but must abate, proportionably, with them. [*Ashburnham* v. *Ashburnham*] 186

2. A. agreed to sell an estate to B. for 1400*l.*, of which 400*l.* was to be paid on the execution of the conveyance, and 1000*l.* was to be secured on mortgage of the estate. B. paid A. the 400*l.*, and A. conveyed the estate to him; but kept possession of the conveyance and of the title-deeds. Some time afterwards B. mortgaged the estate to A. for the 1000*l.*; but, in the interim, he had, unknown to A., mortgaged the estate to C.; but C. did not investigate the title to the estate or make any inquiry relative to the title-deeds. Held that A. was entitled to priority over C. [*Worthington* v. *Morgan.*] 547

See MORTGAGOR AND MORTGAGEE, 4.

PRODUCTION OF DOCUMENTS.

Injunction granted, before answer, to restrain defendants from parting with documents in their possession, belonging to the plaintiff, and from preventing the plaintiff and her solicitor from having access to the documents at all reasonable times and after reasonable notice. [*Goodale* v. *Goodale.*] 316

PROMISSORY NOTE.

See FRAUD.

RAILWAY COMPANY.

1. A notice given by a railway company, under the 32nd sect. of the Railways Clauses Consolidation Act, of their intention to take temporary possession of land, ought to state for which of the purposes mentioned in that section the land is meant to be used. A notice that the company intend to enter upon the land for those purposes, *or some one of them*, is not sufficient. [*Poynder* v. *The Great Northern Railway Company*] 3

2. Money paid into the bank by a railway company under the 85th section of the Lands Clauses Act, ordered to be repaid to them under the 87th section, without any deduction for costs payable, by them, to the land-owner. [*In the matter of the London and Southampton Railway Extension Act*, and *Ex parte the Great Northern Railway Company*] . . . . 165 & 169

3. A land-owner refused to accept purchase-money awarded to be paid to him by a railway company, because he believed the award to be invalid in law. The Judges of the Court of Queen's Bench, after hearing the question argued at great length, and taking time to consider their judgment, decided that the award was valid. Held that the land-owner's refusal to receive the money, was not a wilful refusal, within the meaning of the 80th section of the Lands Clauses Act. [*Bradshaw, Ex parte*] . 174

4. The jurisdiction of the Court is not affected by the 9 and 10 Vict. c. 28, for facilitating the winding-

up of certain railway companies. [*Jones* v. *Lord Charlemont*] . 271
See COSTS, 4.

RAILWAY DEBENTURE.

A debenture of the Newcastle and Carlisle Railway Company, held to be within the Statute of Mortmain. Shares in a joint-stock bank, the property of which consisted of freehold and copyhold estates and mortgages for terms of years, held to be within the Statute of Mortmain. [*Myers* v. *Perigal*] . 533

REAL ESTATES.

See ASSETS.—HEIR.

REDUCTION INTO POSSESSION.

See CHOSE IN ACTION, 12.

RE-EXAMINATION.

See PRACTICE, 8.

REMOTENESS.

1. Testator devised his real estates to trustees, in trust to apply the rents for the maintenance and support of his wife and his present and future grandchildren, during the life of his wife, and, on her death, to convey the estates to all his present and future grandchildren, as they respectively attained the age of twenty-five years, to hold to them, their heirs and assigns, as tenants in common. Held that the trust to convey was void for remoteness. [*Blagrove* v. *Hancock*] . . 371
2. Testator gave the residue of his personal estate, to trustees, in trust to pay the income for the maintenance and education of his grandson George Goring and such other grandchildren, the children of his son George Goring, during their lives or life; and, after the decease of any or either of his said grandchildren, to pay the share of the income of any or either of them so dying, unto their, his or her issue, if any, *until he, she or they, respectively, attained the age of twenty-five years, and then to pay, transfer and equally divide their parent's share of the residue between them*, if more than one, and, if but one, then the whole to such one child absolutely. And, in case either of his grandchildren by his son George, *should die without leaving lawful issue at the time of his or her decease*, and without having obtained a vested interest, he directed that the share or shares of him, her or them so dying should go to the survivors or survivor of them, upon the same trusts as were thereinbefore declared, and to be payable and transferable as thereinbefore mentioned. George Goring, the grandson, died a bachelor; leaving three brothers and a sister surviving him. Held that they were entitled to their deceased brother's share of the income for their lives: because, though the first gift was too remote, the subsequent one was intended to take effect, not by way of remainder but by way of substitution. [*Goring* v. *Howard*] . 395

REPORT.

See PETITION.

RENT-CHARGE.

Testator devised his freehold estates to A. and B. and their heirs, in trust to permit his wife to hold and enjoy the same and to receive the rents thereof for her life; and, after

her decease, in trust to permit his nephew, his heirs and assigns to hold and enjoy the estates and to receive the rents thereof for ever, but subject to the payment of 20*l.* yearly for ever, to his niece, *her executors, administrators and assigns;* with the payment of which sum the testator made chargeable his said estates, *in manner and form aforesaid,* immediately after the decease of his wife. Held that the niece took a legal *rent-charge,* of 20*l.* per annum, *in fee.* [*Ramsay* v. *Thorngate*] 575

REPUBLICATION.

A married lady having, under her settlement, freehold property settled to her separate use, and power to dispose of it by will, exercised that power by devising a certain part of the property to A. for life, with remainder to her nephew, and by devising all the other freehold estates which she had any power to dispose of, to her nephew for life, with remainder to his children. She afterwards purchased some leasehold tenements, out of her separate property, and had them assigned to M., in trust as she should by deed, will or codicil, appoint: and, in exercise of that power, she, by a codicil, bequeathed the leaseholds to her nephew, and confirmed her will. Some time afterwards she purchased the reversion in fee of the leaseholds, and had it conveyed to N. in trust as she should, by deed or will, appoint. She then made another codicil, in exercise, expressly, of the power reserved to her by the settlement *and of all other powers,* and thereby, after reciting the specific devise made by her will, she gave the property which was the subject of that devise to A. in fee. Held that the second codicil did not republish the will, and, therefore, that the reversion in fee in the leaseholds, did not pass by the residuary devise in the will, but the testatrix died intestate as to it. [*Jowett* v. *Board*] . . 352

See CONSTRUCTION, 7.

RESIDUE.

Testatrix having power under her late husband's will, to dispose of 10,000*l.* Consols, recited the power, and then proceeded thus: "Now I do give and bequeath the said 10,000*l.* Consols in manner following; that is to say I give, to G. A. the sum of 500*l.* sterling: I give, to my executors the sum of 600*l.* Consols in trust to pay the dividends to S. T. during her life, and after her decease, the said 600*l.* to sink into the residue of my estate: I give and bequeath to H. B., his executors, &c., all *the rest and residue of the said* 10,000*l. Consols, after deducting therefrom the legacies above-mentioned.* G. A. died in the testatrix's lifetime. Held that the 500*l.* given to him was not to be deducted from the 10,000*l.* Consols. [*Carter* v. *Taggart*] 423

REVERSIONARY INTEREST.

A sequestration having issued against a defendant, who was entitled to a *reversionary interest* in stock standing in the name of the Accountant-General in another cause, the Court gave the sequestrators liberty to sell that interest. [*Cowper* v. *Taylor*] 314

See HUSBAND AND WIFE, 1, 2.

SALE UNDER DECREE.

A testator having directed his real

estates to be sold, the decree in a suit for the performance of the trusts of his will, directed the Master to inquire and state what estates passed by the will, and that all the estates which the Master *should find* to have passed, should be sold with his approbation. The Master having ascertained, from a state of facts laid before him, what estates passed, proceeded to sell them. The purchaser objected to the title because the Master had not made any report in pursuance of the first direction in the decree. But, it being the practice of the Masters in such a case, to sell before they make any report, the objection was overruled. [*Dykes* v. *Taylor*] 563

SEPARATE USE.

See CONSTRUCTION, 21.

SEQUESTRATION.

A sequestration having issued against a defendant, who was entitled to a *reversionary interest* in stock standing in the name of the Accountant-General in another cause, the Court gave the sequestrators liberty to sell that interest. [*Cowper* v. *Taylor*] 314

SETTLEMENT.

See BOND.—CHOSE IN ACTION, 2. —MARRIAGE ARTICLES.

SHARES IN A JOINT-STOCK BANK.

A debenture of the Newcastle and Carlisle Railway Company held not to be within the Statute of Mortmain. Shares in a joint-stock bank, the property of which consisted of freehold and copyhold estates and mortgages for terms of years, held to be within the Statute of Mortmain. [*Myers* v. *Perigal*] 533

SOLICITOR AND CLIENT.

After A. had employed Messrs. B. and C. as his solicitors, they took D. into partnership with them, and A. employed the new firm. In the course of that employment, papers belonging to him came into their possession. Held that B. and C. had no lien on the papers for costs which A. owed them, before they took D. into partnership. [*In re Forshaw*] 121

STATUTE 7 WILL. IV. AND 1 VICT. c. 26.

A. being entitled to a share of a testator's residuary estate, bequeathed *all the effects due to him from the estate*, to his nine children. The estate was then unadministered; but it was, afterwards, administered, and certain debts due to the estate were allotted to A. as his share of the residue. After which he settled the debts in trust for himself for life, remainder in trust for his sons and daughters or any of them, or any of their children, as he, from time to time, by deed or writing, *to be* by him duly executed and attested, or, by his will, should appoint. Held that, under the combined operation of the 24th and 27th sections of the late Will Act (7 Will. IV. & 1 Vict. c. 26,) the will, *though made before the power was created*, was a good execution of it. [*Stillman* v. *Weedon*] 26

STATUTE 3 & 4 WILL. IV. c. 104.

The Court has jurisdiction to order the real estates of a deceased debtor

to be sold for payment of his debts, in a suit instituted, not by a creditor of the deceased, but by a person interested in his estates under his will. [*Rodney* v. *Rodney*] 307

STATUTE OF LIMITATIONS.
See INTEREST, 2.

STAYING PROCEEDINGS IN A SUIT.
All the purposes of a suit having been answered, the Plaintiff moved, before answer, that his costs might be taxed and paid by the defendant, and that, thereupon, all further proceedings might be stayed. Motion refused. [*Langham* v. *The Great Northern Railway Company*] 173

STERLING OR CURRENCY.
A testator domiciled in Jamaica, gave to his son, "one clear annuity of 100*l*. *per annum*, for and during his natural life, and, should he die, a child him surviving, I continue the same annuity for such child's use and benefit, to be paid to his or her mother:" the testator then gave two annuities of 100*l*. *sterling*, to two other persons; and bequeathed his residuary estate to his executors, in trust, amongst other things, to pay the several legacies and annuities before given by him. Held that the annuities given to the son and his child were to be paid in Jamaica currency and not in sterling; and that the child's annuity was a perpetual one. [*Yates* v. *Maddan*] 613

SUBSTITUTED BEQUEST.
See REMOTENESS, 2.

SUPPLEMENTAL ANSWER.
Leave given, to a defendant, to file a supplemental answer, notwithstanding the information which he wished to avail himself of, had been obtained through a violation of professional confidence. [*Raincock* v. *Young*] 122

SUPPLEMENTAL BILL.
See PLEA AND PLEADING, 4, 7.

SURVIVORSHIP.
At the death of a testator, two sums of stock, which had been purchased by him and his sister, were standing in their joint names. One had been purchased by them equally: but much the greater part of the other, had been purchased by the sister, who was still living. Held that the sister was entitled, by survivorship, to both sums. [*Harris* v. *Fergusson*] 308

SURVIVOR OR SURVIVORS.
See WILL. I., 22, 23.

TACKING.
In 1843, A. mortgaged freeholds and leaseholds to B., for 200*l*. In 1845, after reciting that mortgage, he charged the freeholds and leaseholds with the further sum of 400*l*., which he then owed B. and assigned other property to B., as a further security for that sum, and empowered B. to sell the property, and to retain the 400*l*. out of the proceeds. Held that the property assigned in 1845, was redeemable on payment of the 400*l*. only. [*Watts* v. *Symes*] . . . 647

TENANT FOR LIFE.
1. Interest at four *per cent*. allowed, to the tenant for life of a trust fund, upon the amount found due to her

for arrears of interest of the fund. [*Willcocks* v. *Butcher*] . . 366

2. The trustees of a marriage settlement were empowered to invest the trust funds in land, and, afterwards, to resell the lands, with the consent of the tenant for life. After the trustees had invested part of the funds in land, the tenant for life conveyed his interest under the settlement, to a purchaser, by the description of all his life and other estate and interest in all the monies, stocks, funds and securities, and messuages, lands, tenements and hereditaments into which the monies, stocks, funds and securities were, or, *at any time thereafter, might be converted and changed*. Held that the tenant for life's power to consent to a resale of the lands, was not destroyed by the alienation of his interest under the settlement. [*Warburton* v. *Farn*] 625

TENANT FOR LIFE AND REMAINDERMAN.

1. Tenant for life of Bank Stock, held entitled to a bonus, of one *per cent.*, directed to be made, out of the interest and profits on the capital stock of the bank. [*Preston* v. *Melville*] 163

2. Testator having devised his real estates in strict settlement, bequeathed his personal estate, in trust, as far as the nature of it would admit, for the persons who, for the time being, might have the ownership and be in the possession of his real estates under the limitations of his will; and then directed that those persons, *under letters of attorney and powers from the trustees (which he empowered and required them to grant) should receive the yearly dividends which might arise out of the public or other funds, and the yearly interest which might arise from other parts of his personal property*, under the same restrictions and limitations and to the same extent on which they held his real estates. Held that the testator's personal estate was to be enjoyed *in specie*, notwithstanding it consisted, in part, of Long Annuities and Bank Stock. [*Neville* v. *Fortescue*] 333

THELLUSSON ACT.

1. The Thellusson Act must receive the same construction in the case of a trust for accumulation created by deed, as it has received in the case of a similar trust created by will: and, therefore, where A. transferred a sum of stock to trustees, and, by a deed, directed them to accumulate the dividends during the joint lives of M. and N., that direction was held to be good for so much only of the joint lives as expired between the date of the deed and A.'s death. [*In the matter of Lady Rosslyn's Trust*] . . 391

2. Testator devised his freehold estates to trustees in trust to accumulate the rents during the life of his niece, and, on her decease, to stand seised of the estates, to the use of her first and other sons in tail. The testator died in 1827, leaving his niece surviving. Held that the trust for accumulation became void at the end of twenty-one years after the testator's death, and that the testator's heir was entitled to the rents during the remainder of the niece's life. Testator directed the rents of his freehold estates, and the income of his residuary real and personal estate, to be accumulated, in order to provide for the younger children of his niece, and of E. S., each of whom

took an interest under his will; and, in the clauses for the maintenance and advancement of the children, he termed the provision which he had so made for them, sometimes *their portions*, and, sometimes, their *portions or shares*. Held that the provision was not a provision for raising portions within the meaning of the proviso in the second section of the Thellusson Act, and, therefore, was not exempted from the operation of the first section. [*Halford* v. *Staines*] 488

TITLE.

1. P. being lessee of two houses, underlet one to S. and covenanted to indemnify her against the rent reserved by the original lease. S. bequeathed that house (which was numbered four) to P. in trust for L. and appointed P. her executor. P., as the executor and trustee of S.'s will, executed a deed which purported to be an *assignment*, by him to L., of number four, for the residue of the term granted to S. After that, P. bequeathed the two houses to his executors, upon certain trusts. After his death, his executors and trustees demised the house number four to L., for the then remainder of the term granted to S. Held that L. could not make a good title to that house: because the legal estate was merged by the bequest made by S. to P., the immediate reversioner, and, therefore, the *assignment* executed by P. was inoperative; and because the demise made by the executors and trustees of his will, was a breach of trust. [*Law* v. *Urlwin*] . 377
2. A testator having directed his real estates to be sold, the decree in a suit for the performance of the trusts of his will, directed the Master to inquire and state what estates passed by the will, and that all the estates which the Master *should find* to have passed by the will should be sold with his approbation. The Master, having ascertained, from a state of facts laid before him, what estates passed, proceeded to sell them. The purchaser objected to the title because the Master had not made any report in pursuance of the first direction in the decree. But, it being the practice of the Masters in such a case, to sell before they made any report, the objection was overruled. [*Dykes* v. *Taylor*] . 563

TITLE-DEEDS.

See MORTGAGOR AND MORTGAGEE, 1.

TRIAL.

See INJUNCTION, 1.

TRUST AND TRUSTEE.

1. Testatrix gave 1000*l*. to her nephew to maintain and bring up her natural son, F. B.; and she directed the interest of one fourth of her residue to be applied for the maintenance and education of F. B. during his infancy, and the capital to be paid to him on his attaining twenty-one. Held, that the nephew was not a trustee of the 1000*l*. for F. B., but was entitled to it for his own benefit. [*Biddles* v. *Biddles*] 1
2. Testator devised freeholds and copyholds to his son for life, and after his decease to his first and other sons, *paying* 10*l*. a-year to M. C. for life. Held that the word "paying" created a charge and not a trust. [*Hodge* v. *Churchward*] 71
3. Two trustees severed in their defence: one was charged with misconduct, but not the other. The Court allowed only one set of costs

and gave the whole of them to the innocent trustee. [*Webb* v. *Webb*] 55

4. Under a will dated in 1624, real and personal property was vested in the corporation of Reading, upon certain trusts for the poor of that town; and if the corporation neglected to perform those trusts, or misemployed the property for one year, the will gave it over to the corporation of London, in trust for Christ's Hospital. In 1639 a decree was made on an information, in the Exchequer, against both corporations, which directed the corporation of Reading to apply the income of the property for the benefit of the poor of that town, but in a manner different from that prescribed by the will, and that, if the corporation of Reading should neglect to perform the premises or should misemploy the property for one year, they should convey it to the corporation of London in trust for Christ's Hospital. The corporation of Reading neglected to perform the directions of the decree, for several years. In 1837, certain individuals were appointed trustees of the property in their place, under the Municipal Corporations Act. The Court held the decree of 1639 to be binding, and the legal estate in the property, to be still vested in the corporation of Reading; and ordered them to convey the property to the corporation of London, in trust for the Hospital. [*Christ's Hospital* v. *Grainger*] . . 83

5. The Master directed to appoint a new trustee, although some of the *cestuis que trust* were infants and another was out of the jurisdiction. [*Hunter* v. *Gibson*] . . . 158

6. If a petition is presented under the 10 Geo. IV. c. 56, or under the 11 Geo. IV. & 1 Will. IV. c. 60, to have a person appointed to convey property in the place of a recusant trustee, the latter ought not to be served with the petition, and, if he is served, he will be entitled to his costs. [*Ex parte Armstrong and Shallcross*] . 296

7. A person who assumes the character of a trustee, incurs the responsibility of a trustee. [*Rackham* v. *Siddall*] 297

8. A. being entitled, in fee, to freehold hereditaments, the legal estate in which was vested in N., devised the hereditaments to O. and P. in trust to sell them, for payment of her debts, and died without an heir. N. offered to pay the debts, and, subject to the payment of them, claimed to hold the hereditaments for his own benefit. But the Court decreed him to convey them to O. and P. [*Onslow* v. *Wallis*] . 483

See CHARITY, 3. — CONSTRUCTION, 14. — EXECUTORY TRUST. — POWER TO APPOINT NEW TRUSTEES. — TRUST FOR PAYMENT OF DEBTS.

TRUST ESTATES.

Testator devised all his real estates whatsoever and wheresoever, to Grace T., her heirs and assigns, charged with 50*l.* to J. W. Held that estates of which the testator was a trustee, did not pass by the devise. [*Rackham* v. *Siddall*] 297

TRUST FOR PAYMENT OF DEBTS.

A. being greatly in debt, he and his father, in pursuance of an arrangement between themselves, conveyed estates of which they were seised for life and in remainder respectively, to trustees in trust to sell for payment of A.'s debts; but no

creditor was to be entitled to the benefit of the trust, unless the trustees, after having investigated and allowed his debt, should give him a debenture for it. The trustees gave debentures to three of the creditors: after which one of the trustees instituted a suit against his cotrustees, &c., on the hearing of which the Master was directed to take an account of *all* A.'s debts due at the date of the conveyance, and to advertise for his creditors to prove their debts by a day to be named or *be excluded from the benefit of the decree*. The plaintiff and several other creditors of A. proved their debts under the decree; but, nevertheless, the Court, on the hearing for further directions, held that none of them except the plaintiff and the debenture creditors, were entitled to the benefit of the trust. [*Drever* v. *Mawdesley*] . . 511

UNDUE INFLUENCE.

Two years and a half after a young lady had come of age, A., who had been her guardian, and with whom she still resided, drew a promissory note in her favour, and she, at his request, indorsed it. Shortly afterwards, a third person paid the note to his bankers, (who knew that A. was insolvent and had been the young lady's guardian,) and they, on the faith of the indorsement, paid a cheque which he had drawn in favour of A. The Court restrained the bankers from suing the young lady on the note, and would not order her to pay the amount of it into Court. [*Maitland* v. *Backhouse*] 58

VENDOR AND PURCHASER.

P. being lessee of two houses, underlet one to S. and covenanted to indemnify her against the rent reserved by the original lease. S. bequeathed that house (which was numbered four) to P. in trust for L. and appointed P. her executor. P., as the executor and trustee of S.'s will, executed a deed which purported to be an *assignment*, by him to L., of number four, for the residue of the term granted to S. After that, P. bequeathed the two houses to his executors, upon certain trusts. After his death, his executors and trustees demised the house number four to L. for the then remainder of the term granted to S. Held that L. could not make a good title to that house: because the legal estate was merged by the bequest made by S. to P., the immediate reversioner, and, therefore, the *assignment* executed by P. was inoperative; and because the demise made by the executors and trustees of his will, was a breach of trust. [*Law* v. *Urlwin*] 377

See TITLE, 1, 2.

VESTING.

1. Testator bequeathed his residue in trust for his mother for life, remainder in trust for the children of his two sisters, in equal shares as tenants in common and to be *vested interests in the sons at twenty-one and in the daughters at that age or on marriage;* and if any of them should die under age, or, as to the daughters, unmarried, then, as to the original shares *belonging* to the children so dying and the shares to which they might become entitled under the now-stating trust, in trust for the others of them, in equal shares, their executors, &c.; and in case no child should live to attain a vested interest in the trust funds, then in trust for the tes-

tator's next-of-kin. The testator then empowered the trustees, (but, during the life of his mother, with her consent,) to apply the whole or any part of the principal trust-monies to which the children of his sisters *should be entitled* under the trusts thereinbefore contained, for their advancement, notwithstanding they should be under age, or, as to daughters, unmarried: and he directed that, in case, at the death of his mother, any child who, under the trusts thereinbefore contained, might be entitled to any *vested or presumptive share or shares* of the trust-monies, should, if a son, be under age, or, if a daughter, under age and unmarried, the trustees should pay the interest of their shares to his sisters, for the maintenance of their children. The testator's mother died a few months after him. His sisters had several children some of whom were born after the death of his mother. Held that the mother's death, was the period at which the shares vested (subject, however, to be divested) and consequently that the after-born children were not entitled to participate in the funds. [*Berkeley* v. *Swinburne*] 275

2. Testator gave 2000*l.* to trustees in trust to pay the interest to his daughter, for life, and, after her decease, in trust *to pay* the principal unto, between and amongst all her children, *as and when they should attain twenty-one*, in equal shares, "*to whom I* give and bequeath the same *accordingly*." The testator's daughter had only one child, and that child died an infant. Held that the 2000*l.* vested in the child on its birth. [*Bartholomew's trust, In re*] 585

VOLUNTARY SETTLEMENT.

It is not sufficient for a creditor who seeks to set aside a voluntary settlement made by his debtor, to show, merely, that the settlor was indebted when he executed the settlement; but it is not requisite for him to show that the settlor was *insolvent* at that time. [*Scarf* v. *Soulby*] 481

WILL.

1. Testator gave all his real and personal property to his wife for life, and at her death, if he left issue, to the child or children he might have at his decease; but, if he died without leaving issue, then he gave all his property, in equal proportions, to his brothers and sister, Thomas, Anthony, John, and Jane; and, if any of them should die without leaving issue, he gave such share or shares to the survivors or survivor of them; but if leaving issue, he gave such share to their children. The testator died without issue. John died a bachelor in his lifetime. Jane died in the lifetime of his widow, leaving one child and several grandchildren the issue of a deceased child. Thomas survived the widow and died leaving children. Then Anthony died a bachelor. Held that the share intended for John, belonged, absolutely, to Thomas, Anthony, and Jane; that Jane's share belonged to her child; Thomas's, to his children; and Anthony's to his real and personal representatives. [*Benn* v. *Dixon*] 21

2. A., being entitled to a share of a testator's residuary estate, bequeathed *all the effects due to him from the estate*, to his nine children. The estate was then unadministered; but it was, afterwards, ad-

ministered, and certain debts due to the estate were allotted to A. as his share of the residue. After which he settled the debts in trust for himself for life, remainder in trust for his sons and daughters or any of them, or any of their children, as he, from time to time, by deed or writing, *to be* by him duly executed and attested, or by his will, should appoint. Held that, under the combined operation of the 24th and 27th sections of the late Will Act (7 Will. IV. & 1 Vict. c. 26,) the will, *though made before the power was created*, was a good execution of it. [*Stillman* v. *Weedon*] 26

3. A bequest of all the property that the testator might die possessed of, held, from expressions in a codicil of even date, to pass only a part of the testator's property. [*Attorney-General* v. *Wiltshere*] . . 36
4. Testator ordered and empowered the trustees of his will, at their free will and pleasure, to sell part of the trust-property, and, out of the proceeds, to pay *not exceeding* 2000*l.* to his son *for setting him up in business, or for such other purposes as the testator's wife should think proper and most beneficial to him.* The son survived the testator, and afterwards died without having entered into business, and without the 2000*l.*, or any part of it, having been raised. A general demurrer to a bill filed, by his personal representative, to have the 2000*l.* raised, was overruled. [*Gough* v. *Bult*] . 45
5. Testator devised freeholds and copyholds to his son for life, and after his decease to his first and other sons, *paying* 10*l.* a-year to M. C. for life. Held that the word "paying" created a charge and not a trust. [*Hodge* v. *Churchward*] 71
6. Testator, in the eighth clause of his will, directed his executors to purchase a piece of ground, which he described, and to erect a monument upon it for the interment of his own body and the bodies of his parents and sister, and to pay the expense out of the surplus of his property, after discharging his debts and legacies. By the ninth clause, he gave *the remainder* of his property to a charity. The owner of the piece of land refused to sell it. Held that the subject-matter of the ninth clause, was not so implicated with the subject-matter of the eighth, as that, the eighth having failed, the ninth must fail also; but that, the eighth having failed, the whole surplus of the testator's property passed by the ninth clause. [*Mitford* v. *Reynolds*] . . 105
7. A testator being underlessee, for a long term of years, of two houses in Gower Street numbered 63 and 64, and being possessed of two other houses in that street, numbered 67 and 76, for the residues of certain terms for years, bequeathed them to trustees in trust for D. C. for her life, remainder in trust, as to 63, 64 and 67, for his half-brothers and half-sisters (whom he named) and the survivors and survivor of them for their, his or her lives or life, remainder in trust to sell and divide the proceeds amongst their children living at the death of the survivor of them; and, as to number 76, in trust, after the decease of D. C., for his niece, S. C., for life, remainder in trust for her children who should survive her, and, in default of such children, upon the same trusts as he had declared of the other houses

after the death of D. C.; and he gave the residue of his effects to D. C., and appointed her his executrix. The testator, some years after the date of his will, took an assignment of the original lease, which comprised numbers 62 and 65 as well as 63 and 64: and, a few months afterwards, made a codicil, by which he confirmed his will. He, subsequently, made another codicil, which was, in part, as follows: "I also give, subject to her life estate, one moiety of the residue of my estate, unto and amongst my nephews and nieces living at my decease, payable in like manner as, by my will, is directed concerning their shares and interests in the reversion of my houses in Gower Street, except that their shares and interests in the said moiety, is to depend, solely, on the decease of my executrix." D. C. and all the testator's half-brothers and half-sisters, died before the suit was commenced. Held that, though the bequest, in the will, of numbers 63 and 64, was adeemed by the testator taking an assignment of the original lease, the effect of the last-mentioned codicil was to entitle the children of the testator's half-brothers and half-sisters who were living at the decease of the survivor of them, to the testator's interest in numbers 63 and 64, *as it existed at his death*. [*Porter* v. *Smith*] . 251

8. A testator, by his will dated after the recent Will Act had come into operation, expressed himself thus: "And, as to all and singular the residue and remainder of my messuages, lands and hereditaments, whatsoever and wheresoever, and of what tenure or nature soever, and, generally, all the freehold, copyhold, and leasehold estates whereof *I am now seised or possessed:*" and in a subsequent part of his will he used these words: I give to my nephew, all such manors, farms, &c. as well freehold as copyhold and leasehold, as are now vested in me, or, as to the said leasehold premises, *as shall be vested in me, at the time of my death*, as a trustee; to hold, unto and to the use of my said nephew, his heirs, executors, &c., upon the like trusts as the same *are now or shall be vested in me.*" The testator purchased a freehold estate after the date of his will. Held that the will could not be construed to speak and take effect, with reference to the estates to which the testator died beneficially entitled, as if it had been executed immediately before his death. [*Cole* v. *Scott*] 259

9. Testator devised estates to trustees, in trust to pay 300*l.* a-year *for the maintenance, clothing, and education* of his son's children, during the life of their father. The son had three children, all of whom attained twenty-one, and, then, one of them died. Held that the personal representative of the deceased child was entitled to one-third of the 300*l.* a-year during the father's life. [*Lewes* v. *Lewes*] . . 266

10. Testator gave one-third of his residue in trust for his sister, the interest to be paid to her during her life, and the principal, at her death, to go to *the heirs of her body, share and share alike.* The sister had five children living at the testator's death. Held, from the context of the will, that she took for life, with remainder *to her children* as tenants in common. [*Symers* v. *Jobson*] . . . 267

11. Testator bequeathed his residue in trust for his mother for life, remainder in trust for the children of his two sisters, in equal shares as tenants in common and to be *vested interests in the sons at twenty-one, and in the daughters at that age or on marriage;* and if any of them should die under that age, or, as to the daughters, unmarried, then, as to the original shares *belonging* to the children so dying, and the shares to which they might become entitled under the now-stating trust, in trust for the others of them, in equal shares, their executors, &c.; and in case no child should live to attain a vested interest in the trust funds, then in trust for the testator's next-of-kin. The testator then empowered the trustees, (but, during the life of his mother, with her consent,) to apply the whole or any part of the principal trust-monies to which the children of his sisters *should be entitled* under the trusts thereinbefore contained, for their advancement, notwithstanding they should be under age, or, as to daughters, unmarried: and he directed that, in case, at the death of his mother, any child who, under the trusts thereinbefore contained, might be entitled to any *vested or presumptive share or shares* of the trust-monies should, if a son, be under age, or, if a daughter, under age, and unmarried, the trustees should pay the interest of their shares to his sisters, for the maintenance of their children. The testator's mother died a few months after him. His sisters had several children some of whom were born after the death of his mother. Held that the mother's death was the period at which the shares vested (subject, however, to be divested) and consequently that the after-born children were not entitled to participate in the funds. [*Berkeley* v. *Swinburne*] 275

12. Testator bequeathed 5000*l.* in trust to pay the interest to his nephew John for life, remainder to John's first son for life, remainder, as to the principal, for the children of John; and for default of such issue to pay the interest to the second and other sons of John successively and to their respective issue; and, *for default of issue male of John,* to pay the interest to the testator's nephew Charles for life, &c. &c. Held that the words in italics did not mean: "if John shall never have a son," so as to make the limitations to Charles take effect by substitution, but that *that* and all the other limitations subsequent to the limitation to the first son of John, were void for remoteness. [*Burley* v. *Evelyn*] 290

13. Testator devised all his real estates whatsoever and wheresoever, to Grace T., her heirs and assigns, charged with 50*l.* to J. W. Held that estates of which the testator was a trustee, did not pass by the devise. [*Rackham* v. *Siddall*] 297

14. Testatrix bequeathed her personal estate to trustees, in trust, amongst other things, to pay and apply 800*l.* in and upon the education of her godson who was an infant. Held that the whole of the 800*l.* was payable at once, with interest from the end of the first year after the death of the testatrix. [*Noel* v. *Jones*] 309

15. The words: "legal representative or representatives," in a will, held to mean, not: "executors or administrators," but: "next-of-kin."

[*Walker* v. *The Marquis of Camden*] 329

16. Testator devised a manor and farm to A. and B. and their heirs to the use of his son for life, remainder in trust that the trustees, or the survivor of them, should pay and apply the rents and profits, or so much thereof as they or he should think proper, for the maintenance of his son's younger children during their minorities, and, after all those children should have attained twenty-one, to the use of them, their heirs and assigns. Held that A. and B. did not take the legal estate in fee in the devised premises; but that the son took the legal estate for his life, with remainder to A. and B. for a chattel interest, with remainder to the son's younger children in fee. [*Tucker* v. *Johnson*] . . . 341

17. A married lady having, under her settlement, freehold property settled to her separate use, and power to dispose of it by will, exercised that power by devising a certain part of the property to A. for life, with remainder to her nephew, and she gave all the other freehold estates which she had, in any wise, power to dispose of, to her nephew for life, with remainder to his children. She, afterwards, purchased some leasehold tenements, out of her separate property, and had them assigned to M., in trust as she should by deed, will, or codicil, appoint: and, in exercise of that power, she, by a codicil, bequeathed the leaseholds to her nephew, and confirmed her will. Some time afterwards she purchased the reversion in fee of the leaseholds, and had it conveyed to N. in trust as she should, by deed or will, appoint. She then made another codicil, in exercise, expressly, of the power reserved to her by the settlement *and of all other powers*, and thereby, after reciting the specific devise made by her will, she gave the property which was the subject of that devise to A. in fee. Held that the second codicil did not republish the will, and, therefore, that the reversion in fee in the leaseholds, did not pass by the residuary devise in the will, but the testatrix died intestate as to it. [*Jowett* v. *Board*] 352

18. Testator devised his real estates to trustees, in trust to apply the rents for the maintenance and support of his wife and his present and future grandchildren, during the life of his wife, and, on her death, to convey the estates to all his present and future grandchildren, as they respectively attained the age of twenty-five years, to hold to them, their heirs and assigns, as tenants in common. Held that the trust to convey was void for remoteness. [*Blagrove* v. *Hancock*] 371

19. Testator gave the residue of his personal estate, to trustees, in trust to pay the income for the maintenance and education of his grandson, George Goring, and such other grandchildren, the children of his son George Goring, during their lives, or life; and, after the decease of any or either of his said grandchildren, to pay the share of the income of any or either of them so dying, unto their, his or her issue, if any, *until he, she or they, respectively, attained the age of twenty-five years, and then to pay, transfer and equally divide their parent's share of the residue, between them*, if more than one, and, if but one, then the whole to one such child

twenty-one. Held that their shares of his estates became absolutely vested in them in fee, on their attaining twenty-one. [*Wheable* v. *Withers*] 505

28. Testator directed an estate to be purchased with his residuary personal estate, and made hereditary and settled upon his there constituted heir and then to *descend* to his heirs, or, dying without issue, as he should then provide for. The testator then constituted his nephew W. S. his heir and successor, and directed the estate, when purchased, to be *settled on W. S. his heirs and successors in the direct male line*, lawfully begotten and born in wedlock; and in case W. S. should die without issue, the estate to devolve to his brother F. S., his heirs and successors, lawfully begotten and born in wedlock in the direct male line. The testator then declared that his object, intent, desire and command was *that the estate should never pass out of his family, and that no person should hold it under any other name than the one he bore of Shelton*. The Court directed the estate to be settled on W. S. *for life*, with remainder to his first and other sons in tail male; with remainders to F. S. for life, and to his first and other sons in tail male. [*Shelton* v. *Watson*] 543

29. Testator gave the residue of his personal estate to trustees in trust for his wife for life, and after her death, to his daughter, who was an infant at his death: "the same to be always considered as vested in her upon her attaining twenty-one, and to be subject to her disposition thereof; and, by a subsequent clause, the testator gave the property over, in case his daughter should die under twenty-one, *or without disposing of the property by her will*. Held that the daughter was entitled to the property, not absolutely, but only for life with a power to dispose of it by will. [*Borton* v. *Borton*] . . . *552*

See ANNUITY, 3.—APPOINTMENT, 3.—LEGACY, 1, 5.—RENT-CHARGE.—TENANT FOR LIFE AND REMAINDERMAN, 2.—TRUST AND TRUSTEE.

WINDING-UP ACT.

See RAILWAY COMPANY, 4.

WITNESS.

1. Leave given, under the circumstances of the case, to examine a witness, before the Master, after the decree, as to a matter with regard to which he had been examined before the decree. [*The Duke of Leeds* v. *Lord Amherst*] 431

2. Witnesses were examined, for a defendant, *under a commission* in the country. Twenty days after publication, the plaintiff served a notice of motion to suppress the depositions, because no notice of the names, &c., of the witnesses had been given to her. Motion refused on account of the delay in serving the notice, and because the plaintiff's solicitor was present during the execution of the commission, at the inn at which it was executed, knew what was taking place, and saw and conversed with the witnesses. [*Smith* v. *Pincombe*] 497

Stevens and Co., Printers, Bell Yard, Lincoln's Inn.

Stanford Law Library
3 6105 062 833 871